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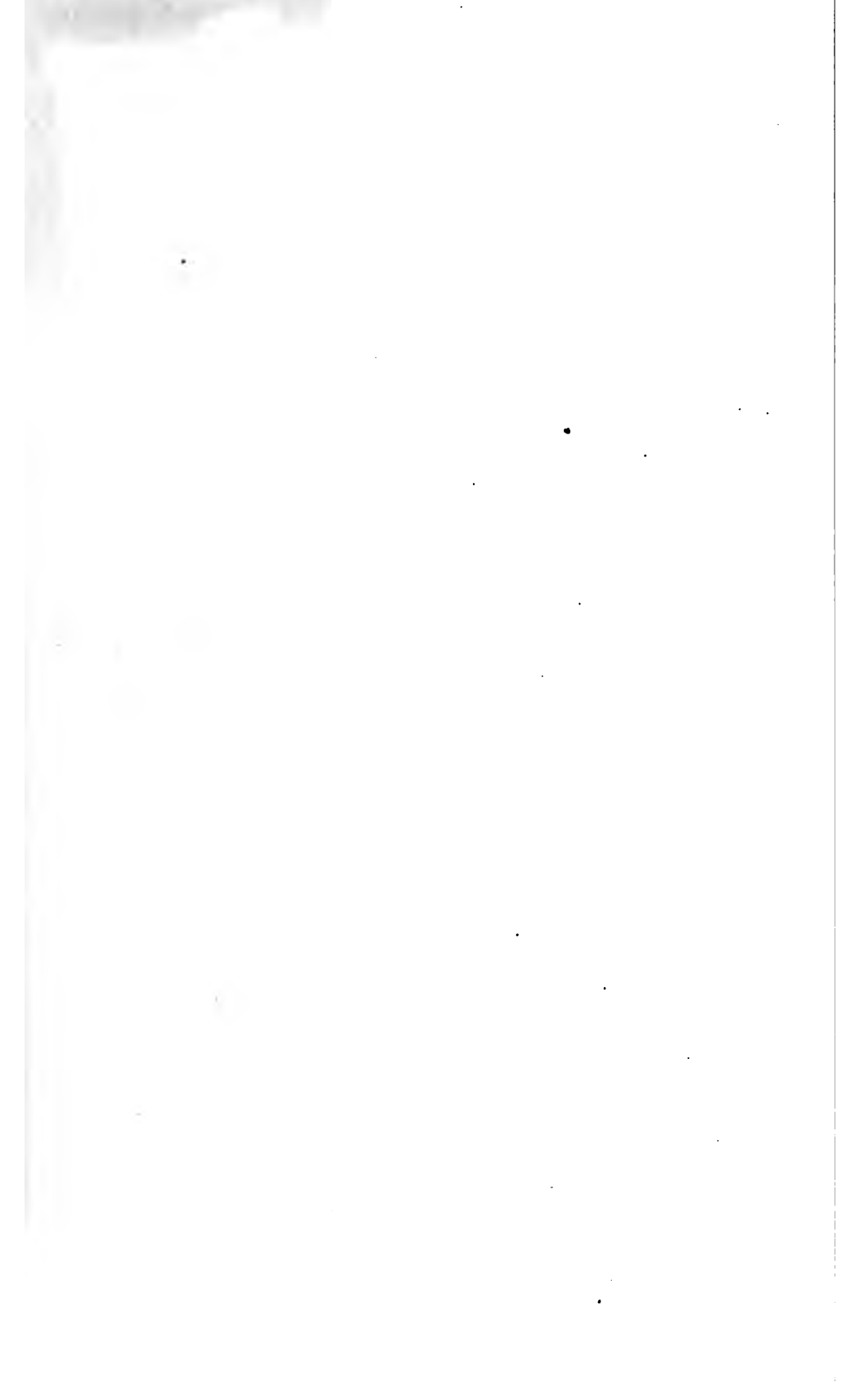
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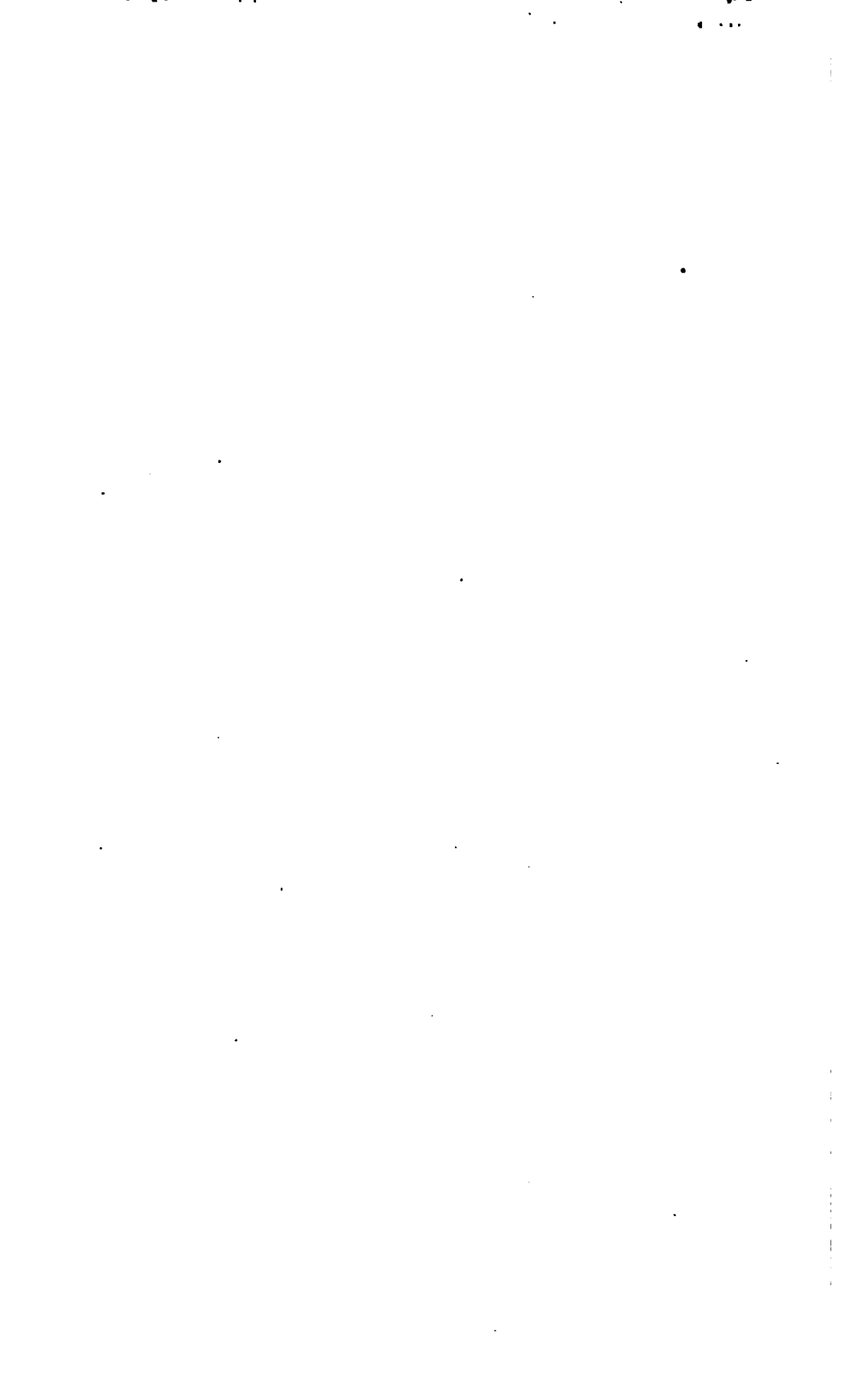
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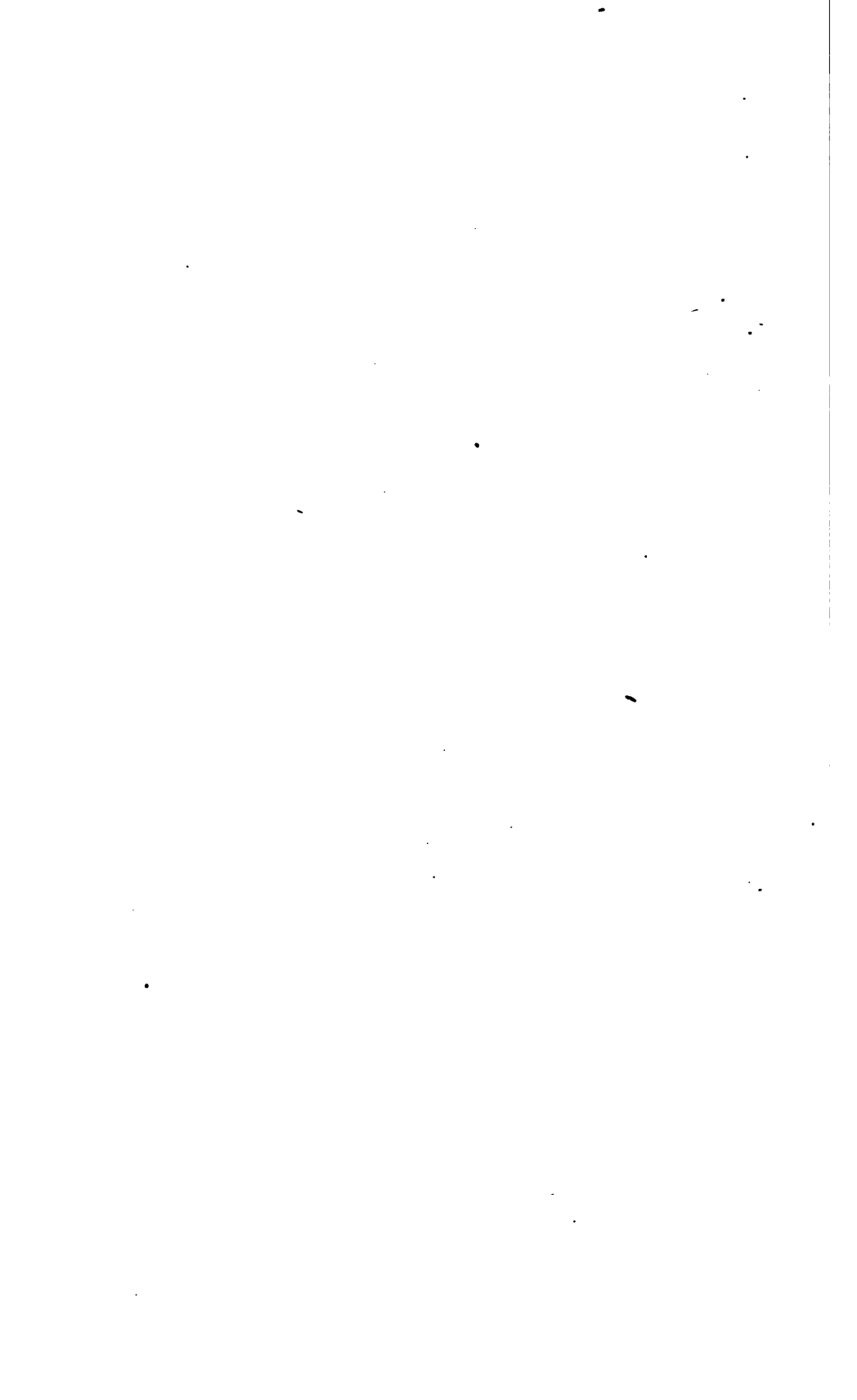
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A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

J. C. THOMSON, - - - EDITOR.
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VOLUME XLI

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THE
AMERICAN AND ENGLISH
RAILROAD CASES.

VOLUME XLI.

JORDAN

v.

ST. PAUL, MINNEAPOLIS & MANITOBA R. CO.

(*Minnesota Supreme Court, December 9, 1889.*)

Special Findings—Motion to Set Aside—New Trial.—When there is a general verdict, and also special findings of fact, it is not proper practice to move to set aside one of the findings of fact as contrary to the evidence, without asking for a new trial of the whole issue or of that particular question of fact, especially if setting it aside would require a judgment different from what would be required if it were allowed to stand.

Obstruction of Surface Waters—Construction of Railroad Across Prairie.—The rule that a land-owner may improve his own land for the purpose for which similar land is ordinarily used, and may do what is necessary for that purpose—as, to build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water that would otherwise remain there, or to shed surface water over land on which it would not otherwise go—applied to a railroad company constructing its road across a prairie country.

APPEAL from District Court, Clay County.

W. B. Douglass for appellant.

M. D. Grover and *W. E. Dodge* for respondent.

GILFILLAN, C. J.—From the course of the trial in this case, as shown by the settled statement of the case, it is apparent that the parties did not, by consent, enter upon the trial of any other than the issues made by the pleadings. Complaint. This makes it necessary to refer to the complaint to ascertain what issues it presents; that is, what act of the defendant it alleges as wrongful. It alleges that the defendant wrongfully, unlawfully, wantonly, negligently, and maliciously cut, dug, and made, and caused to be dug, cut, and made,

two certain large ditches about six miles in length, one on each side of its roadbed, parallel with and about ten feet from it, and connected them by means of five large culverts, the locations of which are given, the ditches running through large quantities of low and wet land, and which ditches did and do gather and accumulate large quantities of water by draining said low and wet lands, and did and do at certain seasons of the year convey large and enormous quantities of surface water from said culverts and from said two ditches, which water, by reason of and on account of said ditches and culverts, was unnecessarily made and forced to run in large and destructive currents through the ditches and culverts over large quantities of land, including that of plaintiff, whereby plaintiff's land was overflowed and covered with water, damaging his crops. It is not alleged that there was anything wrongful in the mode of constructing the ditches or culverts; that the former were (if properly there) either too large or too small, or were unskillfully or badly constructed; or that the latter were badly constructed, or were insufficient in capacity or number, or improperly located; or that either ditches or culverts as constructed were unnecessary to the proper construction of the railroad. The complaint really calls in question only the right of the defendant to have the ditches and culverts there, even though necessary to the railroad, if their effect would be to accumulate surface water, and cause it to flow on plaintiff's land, where it would not otherwise flow. The jury rendered a general

Verdict.

verdict in favor of the plaintiff, and also returned answers to 16 specific questions of fact, which the court submitted to them to find upon. The plaintiff moved to set aside one of the special findings on the ground that it was contrary to the evidence, which motion was denied; and the defendant moved to set aside the general verdict, because inconsistent with the special findings, and for judgment on the special findings, which motion was granted, and judgment was accordingly entered, and the plaintiff appealed.

Where there is a general verdict and also special findings, we do not think it proper practice to move to set aside one of the special findings upon an essential fact on the

Motion to set aside finding.

ground that it is contrary to evidence, without asking to have a new trial, either of the whole issue or of the particular question of fact. If such a finding could be set aside on that ground, leaving the general verdict and other special findings to stand, then, if setting it aside would require a judgment different from what would be required if it were retained, the setting it aside on the ground stated would have the effect of a trial by the court without the jury.

In this instance, however, within the issues, whether the special finding were set aside or retained would make no difference with the right to judgment. It was only to the effect that the rainfall on the occasion referred to in the complaint was extraordinary and unusual. Whether it was ordinary or extraordinary would make no difference with defendant's liability upon the issues presented by the complaint.

It is conceded that the defendant had a right to construct and maintain its railroad, and that its acts were done upon its right of way, rightfully acquired. It is to be regarded, therefore, as an owner doing the acts complained of on its own premises; and its duty and liability are to be measured by the rule as to the duty and liability in respect to surface waters that attaches in the case of an owner in the use of his own land. The district through which, so far as involved in this case, the defendant's road runs is prairie country, with depressions in the surface, such as are found in every prairie district in this state, along which surface waters, especially when subsiding, flow until they find an outlet, or until they are absorbed in the soil, or pass off by evaporation.

Two of the questions submitted to the jury were as follows: (1) Were the excavations by the railroad made by excavating the earth therefrom for the purpose of constructing the defendant's railroad, and not for the purpose of drainage? (2) [Was the defendant's railroad properly constructed, and in the usual and ordinary manner of constructing railroads in prairie countries], and with culverts so placed as to equalize the ordinary flow of surface water?" The first question, and that part of the second which we have placed in brackets, were answered in the affirmative; that part of the second not in brackets in the negative. As we have seen, no question is presented by the complaint as to the proper location of the culverts. The finding as to them is, therefore, outside of the issues, and must be disregarded. And it is the same as to the last question submitted, referring to the sufficiency of the ditches to carry off ordinary surface water. No other of the special findings modifies in any degree the finding on the two questions we have quoted.

The case is therefore one where a railroad company, for the purpose of properly constructing its roadbed, takes earth from one part of its premises and uses it upon the roadbed, thus leaving an excavation or ditch along each side of it, which is the usual and ordinary way of constructing railroads in prairie countries. It is evident that in a flat country, if it be desirable to raise the roadbed above the natural surface of the ground, the earth must be taken, as was done in this case, from along-

Liability for
obstruction
of surface
waters.

side of the roadbed, and that so taking it will necessarily leave an excavation or ditch from which the earth has been taken. The right of one land-owner to use and improve his own land for the purpose for which similar land is ordinarily used, and that he may do what is necessary for that purpose, and that he may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go, is in accordance with the common-law rule as to surface waters, and is fully recognized in this state. *Lee v. Minneapolis*, 22 Minn. 13; *O'Brien v. St. Paul*, 25 Minn. 331; *Henderson v. Minneapolis*, 32 Minn. 319, 6 Am. & Eng. Corp. Cas. 4; *Rowe v. St. Paul, M. & M. R. Co.*, 39 Am. & Eng. R. Cas. 255. The right to so use and improve one's own land does not, however, include the right to do so merely by transferring from it surface waters naturally resting upon it to the land of another. It is only where such shifting of the burden follows as an incident to using or improving his land as such land is ordinarily used or improved, that it can be justified. *Kobs v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul*, *supra*; *Hogenson v. St. Paul, M. & M. R. Co.*, 31 Minn. 224, 14 Am. & Eng. R. Cas. 291; *Townships of Blakely v. Devine*, 36 Minn. 53; *Pye v. Mankato*, 36 Minn. 373; *Olson v. St. Paul, M. & M. R. Co.*, 38 Minn. 419, 34 Am. & Eng. R. Cas. 152. This case comes within the rule of the cases first above cited. Judgment affirmed.

Obstruction of Surface Waters.—See *Rowe v. St. Paul, M. & M. R. Co.* (Minn.), 39 Am. & Eng. R. Cas. 255; *Thomson v. Seabastcook & M. R. Co.* (Me.), 36 *Id.* 662; *Philadelphia, W. & B. R. Co. v. Davis* (Md.), 34 *Id.* 143, note 148; *Waldrop v. Greenwood, L. & S. R. Co.* (S. Car.), 34 *Id.* 204.

MISSISSIPPI & TENNESSEE R. Co

v.

ARCHIBALD *et al.*

(*Mississippi Supreme Court, January 27, 1890.*)

Obstruction of Water-Course—**Liability of Railroad Company.**—Two water courses with well defined channels from 20 to 30 feet wide and 6 to 10 feet deep, ran through plaintiff's land. In one of these water courses, in order to protect its roadbed from inundation, defendant erected and maintained a bulkhead whereby the waters were diverted from their channel and

thrown on the lands of plaintiff. By way of further protection, defendant cut a ditch with its open face next to the roadbed and threw up a levee ranging from 1 1-2 to 4 feet in height across the entire western boundary of plaintiff's land, whereby the diverted waters from the one stream, and the overflowed waters from the other, were thrown back upon, and damaged plaintiff's lands. At each of three trestles built by defendant in its roadbed for the outflow of the creeks there had been three replacements, and each time the old piles were not removed, but were cut off above the surface with the result that but a small opening was left for the escape of the water. *Held*, that the injuries to plaintiff's lands must be deemed to have been caused by the obstruction of the streams, and that the defendant was liable although the accumulations of sand, etc., therein had been increased by the removal of timber from the side hills and other natural causes.

Same—What are Surface Waters.—When waters gathered from the hills along the bank of a stream, and caused by the rainfall, have once become part of the stream, they are governed by the rules applicable to water courses and not by the rules applicable to surface waters although they should be dammed back and caused to flow upon adjoining lands.

Same—Right of Action of Purchaser of Lands.—Although the obstruction which causes waters to overflow upon adjoining lands has been placed in the streams before the plaintiff in an action acquired title, the injury is to be deemed a continuing one, and the plaintiff is entitled to recover damages.

APPEAL from Circuit Court, Panola County.

W. P. & J. B. Harris for appellant.

Sullivan & Whitfield for appellees.

WOOD, C. J.—This action was instituted by appellees, in the circuit court of Yalobusha county, for the recovery of damages alleged to have been sustained by reason of the negligence of appellant in the building and repair of certain trestles over certain water-courses which drained the lands of appellees, by means of which negligent building and repair the said water-courses were filled up and choked, and said lands overflowed and submerged, and their value destroyed. There was a plea of not guilty filed by the railroad company, and a change of venue to the second district of Panola county, by consent of parties. On this issue there was a verdict for plaintiffs below in the sum of \$1,500, and judgment accordingly. From this judgment the railroad appeals to this court. Case stated.

We do not understand that it is disputed that appellees' lands have been submerged and damaged by reason of the damming of the water-courses referred to and described in the pleadings and proofs. The controversy goes to the causes producing the overflow and damage. On the part of appellees, it is urged that the careless, negligent, and insufficient manner of building and repairing the trestle of the railroad where the roadbed crosses the water-courses, and the erection of a bulkhead in Alston creek by appellant, and the construction of a small Questions in issue.

levee on the railroad's right of way, and near to the lands in question, have gradually raised the beds of the streams, and partially filled and choked their currents, and, in seasons of rains, actually dammed the water-courses at the trestles, whereby the waters brought down in the channels were unable to flow and escape across the defendant's roadbed, and so were forced out of their beds, and driven back on the lands, covering them with a deposit of sand and gravel, and greatly depreciating, if not wholly destroying, their value. For appellant, it is insisted that the injuries complained of are the results of natural causes long operating, and now only reaching that stage of destructiveness of which appellees complain. It is said that the denuding the range of hills, which lie east of and enclose the lands in question, of their timber, and the subjecting the soil of these hills to the processes of cultivation, in ordinary agriculture, must result, with unerring certainty, in the rapid disappearance of the loamy top soil, and its transference to valleys below, and the gradual washing away of large parts of the looser material composing the bulk of the hills, and their deposit in the runs and ditches and water-courses into which the surface waters from the hills pour, and so by the operation of natural causes, in the changed condition of the hills, the streams have become, in process of time, filled with these deposits from the hills, and that hence the overflows upon appellees' lands, and their destruction by deposits of sand and gravel, result from agencies over which the railroad has no control whatever.

We think this statement fairly presents the real issue. While there is a vast mass of testimony, and some conflict in matters apparently important, stripped of all superfluities the case will be found to be of the character disclosed in the statement just made. It is not a question of obstructing or diverting or discharging surface water by one owner upon the lands of an adjacent owner. The law applicable to such cases finds no room for examination in the case before us. The controlling question here is this, viz., were these water-courses obstructed by the negligence of the railroad, whereby the lands have been overflowed and damaged: or are these obstructions the product of natural agencies, long operating, and just now making their hurtful power to be noticed and felt?

It must be admitted, we think, that the stripping of up-lands of their timber, and the stirring and loosening of their soils by the processes of cultivation, has the natural effect of carrying off, in a rapid manner and in large measure, the lighter portions of the hills so

Removal of
trees.

loosened and made ready to be carried away to the lowlands by storm and rain. It is doubtless true, too, that the operation of these natural causes contributed materially to the overflows which are alleged to have damaged the lands in question. Indeed, it is manifest that without such contribution by natural causes there could be no choking of channels, and damming of water-courses, ordinarily. We can scarcely conceive of any stream ever becoming choked or dammed with boughs and leaves, and sand and silt, unless natural causes are taken into the account.

Granting the full operation of natural causes in the case at bar the vital question yet remains unanswered. That question is, did the defendant railroad, with presumable knowledge of the changed conditions of the lands, and their environment, and of the unfailing operation of the natural agencies we have adverted to, do or omit to do anything, in the line of its duty, whereby the flooding of appellees' lands, and their consequent destruction, were made probable, not to say inevitable, after every heavy rain-fall? A glance at the uncontroverted proofs will answer the question. Two of the water-courses under consideration, Alston's creek and Bates creek, were streams with well defined channels, in width from 20 to 30 feet, and in depth from 6 to 10 feet. In one of these water-courses, in an effort to protect its roadbed from inundation, appellant erected, and for a few years maintained, a bulk-head whereby the waters in that stream were diverted from their channel, and bodily thrown on the lands of appellees. By way of further protection to its roadbed, appellant cut a ditch with its open face next to the roadbed, and threw up a levee ranging from 1½ to 4 feet in height across the entire western border of appellees' lands, whereby the diverted waters from Alston's creek, and the overflowed waters from the other creek, were thrown back on the lands alleged to have been damaged; and at each of the three trestles, built by the railroad, in its roadbed, for the out-flow of the three creeks, there is shown to have been three replacements of such trestles, and on each occasion the old piles which supported the trestles were not removed, but were cut off above the surface of the water ready to catch any drift brought down by the waters from above, with the result of having left a small opening for the escape of the waters in these streams, whereas the depth of such channels, as we have already seen, was originally 6 to 10 feet. Conceding the action of natural causes, and the legitimate effects of such action, as contended by appellant's counsel, can it be successfully maintained that the conduct of the railroad in the particulars just above men-

Obstruction
of water-
courses.

tioned was such as to free it from liability? To ask the question in the light of the facts of the case, is to answer it. The railroad, in our opinion, directly contributed to the creation of those obstructions in the water courses which flooded appellees' lands, and resulted in the injuries complained of. Moreover, the consideration of the conduct of appellant, as showing proper care, or the want of it, in these various particulars, as well as the consideration of the action of natural causes operating in this case, was properly matter to be submitted to the determination of a jury. It was so submitted, and the finding of the jury is abundantly supported by the evidence in the case, and meets our approbation.

It is asserted by counsel for appellant that, appellees having bought the lands subsequent to the building of the railroad, and with full knowledge of the evil, and it not having been shown that anything has been done by the railroad since appellees' acquisition of title to cause the injury complained of, the railroad company cannot be held liable in this action. We think counsel misconceives. The wrongs done by appellant are continuing wrongs. The action of appellant of which complaint is made has been silently and slowly operating, but without hurt or damage until recently. The causes which have resulted in this injury have been continuously working, and the injury itself is a continuing one. In the very section in Angell on Water-Courses to which appellant's counsel refer us for support of their proposition, we find it declared that a plaintiff is entitled to recover although the dams producing such injury were erected before the plaintiff had any interest in the property to which the injury was done, and the dams had not since been raised. See Ang. Water-Courses, § 465; *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486.

Let us examine briefly the law on which the court below submitted the case to the jury. Complaint is made that the fourth instruction for plaintiff below was improperly given, inasmuch, as is said, there was no evidence to support it. The charge, in effect, instructs the jury that if the defendant railroad, since October, 1885, had carelessly obstructed the waters in the water-courses so as to cause them to overflow the lands of plaintiffs, and to damage them, then the jury should find for plaintiffs. The charge as it seems to us, is clearly correct, and is not wholly inapplicable for want of evidence on which to rest. The evidence unmistakably shows that at some one or all of these three trestles, several times in each year, after heavy rains, the water courses are so obstructed as to prevent the outflow of the currents across the railroad, through these trestles, whereby the floods were backed upon

Right of action of purchaser.

these lands, and that this injurious condition remained until the railroad hands removed the drift-wood and other obstructing materials, and opened the outlets. The exception, as it appears to us, is therefore not well taken.

We disagree with counsel, also, in their views as to the first, second and third instructions given for plaintiffs below. As in the fourth, so here in these three, we think there was evidence which warranted the trial judge in giving the charges. The propositions of law embraced in these four instructions are conceded to be correct in the abstract, and we are of the opinion that they were correct in their concrete application also.

The action of the court below in refusing certain charges asked by the railroad company having reference to the law applicable to the control of rain-water and surface water, as distinguished from waters flowing in defined channels of streams, is assigned for error likewise. The most cursory examination of the record will demonstrate that this was not a case in which any question concerning surface water was presented. It is undeniable that the great body of the waters which flowed through these water-courses was hastily gathered into the channels of the streams from the rain-falls on the hills and other lands adjacent to them; but it is equally undeniable that when once this surface water has found its way to the beds of well defined streams, and has joined their currents, it ceases to possess any of the qualities of surface water, and is regarded only as part and parcel of the volume that flows in the channels of the water-courses. The waters which flooded the lands of the appellees, doubtless, were largely gathered from the hills ranged to the east of the scene of their destructiveness; but long before the injury had been wrought they had mingled with all other waters in the torrent, and had been stamped with all the distinctive marks of waters gathered into water-courses. Entertaining this view, we think the court below properly refused these instructions, touching the powers and rights of owners over surface water, as tending, in all likelihood, to confuse and mislead the jury.

Looking at the entire case, we are unable to say that the proper conclusion was not reached; and the judgment of the court below is therefore affirmed.

Instructions
as to law of
surface
waters.

Surface Waters—Overflow of Streams.—Waters overflowing the bank of a stream in consequence of the insufficiency of the natural channel to hold and carry off the same have been held to be surface waters. *Taylor v. Fickas*, 64 Ind. 167; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, (Mo.) 20 Am. & Eng. R. Cas. 103; *Shane v. Kansas City, St. J. & C. B. R. Co.*, (Mo.) 5 *Id.* 64; *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57

Mo. 433, 70 Mo. 359, 35 Am. Rep. 431. But where waters left the banks of a well defined stream, flowed over adjoining lands for a short distance, and were then stopped by an embankment and forced into a stream above a culvert, it was held that they were not surface waters, but that in determining the sufficiency of the culvert, they must be regarded in the same light as if they had continuously flowed into the stream. *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa 659; *Moore v. Chicago, B. & Q. R. Co.*, 75 Iowa 263.

BALTIMORE & OHIO & CHICAGO R. CO. *et al.*

v.

KETRING *et al.*

(*Indiana Supreme Court, January 30, 1890.*)

Drains—Liability of Railroad to Assessment.—The Indiana Act of April 8, 1881, as amended by the Act of March 8, 1883, authorizes the assessment of the easement, or right of way of a railroad company for the cost of establishing a drain.

Same—Trial by Jury—Statutory Proceedings.—Proceedings under a statute authorizing the establishment of a drain upon petition by the owners of property, are special in their nature, and, being purely of statutory origin, the legislature may prescribe the mode of trial, and may grant or withhold the right of trial by jury at its pleasure.

Same—Application of Rules of Practice to Proceedings—Motion for New Trial.—The provision of the Indiana Act of 1883 relative to proceedings for the establishment of drains, that the petition shall be docketed as an action pending, subjects the proceedings to all the rules of procedure which govern the trial of ordinary civil actions, except as otherwise provided; and whenever a motion for a new trial is necessary in an ordinary civil action, it is equally necessary in proceedings to establish drains.

Same—Drainage of Lakes—Indiana Statute.—The Indiana acts relative to the establishment of drains, were not intended to provide a system for the drainage of fresh water lakes, but were only intended to apply to wet and marshy lands, swamps, ponds, and the like.

APPEAL from Circuit Court, Kosciusko County.

H. Newbegin, B. B. Kingsbury, Hammond & Royce, W. S. Marshall, J. W. Cook and W. B. Fishback for appellants.

Frazer & Frazer for appellees.

BERKSHIRE, J.—This is a proceeding to establish a ditch under an act of the legislature approved April 8, 1881, as amended by an act approved March 8, 1883. Elliott, Case stated. Supp. § 1175. The petition was filed in the office of the clerk of the Kosciusko circuit court March 28, 1883. The 14th day of May, 1883, was the day noted for docketing the petition; and on that day the court, having found that the required notice had been given, ordered the petition docketed as an action pending in the Kosciusko circuit court.

On the 18th day of May, 1883, the court having found that no demurrer, remonstrance, or other objection had been filed, ordered that the petition be referred to the drainage commissioners of said county, and designated the 28th day of said month as the day on which they should meet, and the 18th day of the following June as the day on which to make their report to this court. At the same time the place at which the commissioners would meet was designated, and copies of the petition and order of the court delivered to them. At the place and on the day named for the commissioners to meet, they came together, and entered upon the performance of their duties; and afterwards, and on the day designated for them to report, they appeared in open court, and made their report; and, it appearing that lands were included in the report which were not named in the petition, the court ordered that the necessary notice be given, and fixed the 30th day of the said month of June as the day on which said report would be considered, and on said last-named day the petitioners made proof of the giving of said notice. On the 19th day of said month of June, Nathaniel Crow and others filed a motion that the court require the report of the commissioners to be made more specific. On the 26th day of the said month the said Crow and William Moon, two of the appellants, filed remonstrances; and on the 27th day of said month the appellant, the Baltimore & Ohio & Chicago Railroad Company, filed its remonstrance, and on the next day following filed an additional or supplemental remonstrance. On the 30th day of said month the Cedar Beach Association filed its remonstrance. Motions followed to strike out all the parts of each of said remonstrances.

The court sustained the motion to strike out the said supplemental or additional remonstrance of the Baltimore & Ohio & Chicago Railroad Company. The court committed no error in this ruling, as the statute expressly provides for the assessment of the easement or right of way of a railroad company. Section 1175, *supra*. See Indianapolis & C. Gravel Road Co. v. Christian, 93 Ind. 360. Parts of other remonstrances were stricken out; but, as this ruling of the court presents no material question, we are not called upon to consider it.

The appellants demanded a trial by jury, which the court refused, and they excepted; but, as they filed no motion for a new trial, the question is not in the record for our consideration. The necessity of a motion for a new trial will be considered further on. It is not improper to suggest, however, that this is not a common law action, but a special proceeding, purely of statutory origin. It has fre-

Liability of
railroad to
assessment.

Trial by jury.

quently been ruled by this court that in all such proceedings the legislature may prescribe the mode of trial, and extend or withhold the right of trial by jury at its pleasure; that the constitutional provision to which our attention has been called is only applicable to that class of common-law actions wherein the right of trial by jury existed when the constitution was adopted. *Anderson v. Caldwell*, 91 Ind. 451; *Indianapolis & C. Gravel Road Co. v. Christian*, *supra*; *Ross v. Davis*, 97 Ind. 79; *Lipes v. Hand*, 104 Ind. 503; *Drebert v. Trier*, 106 Ind. 510; *Laverty v. State*, 109 Ind. 217. We may add that an ample remedy is furnished to all persons whose lands may be affected or appropriated in the location of a ditch.

There was nothing in the motion to require the commissioners to make their report more specific; but, if otherwise, after the motion was filed the report was amended, and the motion not refiled. No motion was made for a new trial. Therefore, notwithstanding the many exceptions taken on the trial, and errors assigned in this court, all questions properly presented have been considered, except such as relate to the motion in arrest of judgment. Section 2 of the act of 1883 (Elliott, Supp. § 1176) provides that the petition shall be docketed as an action pending. Because of this provision, it must have been the intention of the legislature that, after the docketing of the petition as an action pending, it be subject to all the rules of procedure which govern in the trial of ordinary civil actions, except as specially otherwise provided. To hold otherwise would be to entirely disregard the said provision. Having reached this conclusion, the further conclusion that must follow is that whenever a motion for a new trial is required in an ordinary civil action to present a question to this court, it is equally necessary, in a proceeding like the one before us, to present a similar question. But see *Neff v. Reed*, 98 Ind. 341; *Crume v. Wilson*, 104 Ind. 583; *Bass v. Elliott*, 105 Ind. 517.

This leads us up to the motion in arrest of judgment. In support of this motion two questions are discussed; (1) If the said statutes include within their purview and scope fresh-water lakes, then they are unconstitutional; (2) it was not the intention of the legislature, when they enacted the said statutes, to provide for the drainage of the fresh-water lakes within the state. Whenever legislative power to enact a statute which has been placed in the statute-book is seriously involved, the question is of the gravest importance, and should only be determined and decided after great care and consideration by the court, and after full and comprehensive argument by counsel.

Motion for
new trial.

Constitution-
ality of
statute.

The question has not been thus discussed by counsel. In fact, there seems to be some difference of opinion among counsel for the appellants upon the question. In view of what we have said, together with the fact that the conclusion reached by a majority of the court as to the second question stated renders it unnecessary for us to pass upon the constitutional question, we therefore express no opinion as to it.

A majority of the court have reached the conclusion that the subject-matter involved in this proceeding does not fall within the purview and scope of the said acts of the legislature; that the legislature, in the passage of said acts, did not intend to provide a system of drainage for the fresh-water lakes of the state; that the statutes apply, and were only intended to apply, to wet and marshy lands, swamps, ponds, and the like; and therefore that the circuit court of Kosciusko county had no jurisdiction, and erred in overruling the motion to arrest the judgment. The writer does not agree with the conclusion reached by the majority of the court, but does not care to extend this opinion with a statement of the reasons which lead him to a different conclusion, because to do so would be of no practical importance. The judgment is reversed, with costs, with directions to the court below to dismiss the petition.

Drainage of
lakes.

ELLIOTT, J., concurs in the conclusion reached.

OLDS, J., dissents as to the conclusion reached that the purview and scope of the statutes are not sufficiently broad to cover fresh-water lakes.

KANKAKEE & SENECA R. CO. *et al.*

v.

HORAN.

(*Illinois Supreme Court, January 21, 1890.*)

Obstruction of Water-Course—Liability of Parent Company for Act of Auxiliary Company.—Where the evidence establishes that a railroad company was organized and its road built in the interest of another and older company, and that the newly organized company was but a mere instrument used by the older company for the construction of a railroad, extending its then existing line, both railroad companies are to be deemed joint actors in the construction of the new road, and both are liable for a nuisance caused by the construction of the railroad embankment, ditches and bridges in such a manner to cause adjoining lands to be overflowed.

Same—Right of Action of Owner of Reversion.—A complaint which alleges the construction and maintenance by the defendants of a railroad and its appurtenances, consisting of a permanent embankment, ditches, bridges, etc., by means of which the waters of a water-course are and will be permanently dammed up, diverted and caused to set back upon a farm, thus creating a continuing and permanent nuisance, is sufficient to state a cause of action in favor of the owner of the reversionary estate.

Same—Measure of Damages—Tenancy at Will.—Where a person in possession of lands is merely a tenant at will the measure of damages in an action by the owner of the reversion for a permanent and continuing nuisance arising from the overflow of the lands, is the depreciation in the market value by reason of the overflow. The tenancy is not such an estate as to require apportionment between it and the reversion of the damage arising from the depreciation of the market value of the land.

Same—Damages—Competency of Opinion Evidence.—In an action for damages to land caused by an overflow which is permanent in its nature, the opinion of witnesses as to the market value of the land before and after a railroad was built, and that the depreciation in value was caused by an overflow resulting from the construction of the railroad, is admissible.

Same—Admissibility of Maps of Lands.—Maps or plats of the lands in question which have been identified by the witnesses and shown to be substantially correct, are admissible in an action to recover damages for overflowing lands.

Same—Evidence—Petition for Change of Venue—Harmless Error.—The admission of a petition for a change in venue for the purpose of establishing the date when a railroad company was constructed and that it is operated by a co-defendant of the company which constructed it, is not reversible error when it appears that both facts are sufficiently established *aliunde*.

Same—Evidence—Bill for Injunction.—The bill in a suit to enjoin the prosecution of an action to recover damages for the overflow of lands, is competent evidence in the action for damages of admissions by the plaintiff therein; and the fact that the defendants in such bill filed a demurrer to it, does not render it incompetent, the admission contained in the demurrer being only for the purpose of obtaining the judgment of the court as to the sufficiency of the bill on its face.

Same—Testimony of Deceased Witness—Bill of Exceptions.—The testimony of a deceased witness given on the former trial of a cause, cannot be shown by the bill of exceptions given at that trial.

Same—Joint Tort-Feasors—Evidence—Mortgage by Auxilliary Company.—Where two railroad companies are sued for jointly causing a nuisance upon lands, the one as the owner of the railroad, and the other as having caused the first company to be constructed for the purpose of extending its own line, a mortgage by the company constructing the railroad is not admissible for the purpose of establishing that the company owning the railroad was the principal or sole actor in creating the nuisance.

Same—Erection of Bridge—Increased Flow from Drainage.—A railroad company in constructing a bridge over a water-course is bound to anticipate and provide for any such lawful increase of the water flow as may be caused by the drainage of adjoining lands into it.

APPEAL from Appellate Court, Second District.

G. S. Eldredge for appellants.

S. C. Stough and *R. M. Wing* for appellee.

BAILEY, J.—This was an action on the case, brought by

Owen Horan against the Kankakee & Seneca Railroad Company and the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, to recover damages to the plaintiff's estate in reversion in certain lands, caused by the obstruction of a natural water-course, and the diversion of the water therefrom to and upon said lands. The declaration contains six counts. The first, second, and sixth counts allege, in substance, that at the time of the commission of the grievances thereafter mentioned, a certain farm in Grundy county, containing 240 acres of land, was in the possession and occupancy of Frank Horan as the plaintiff's tenant, the reversion thereof then and there and still belonging to the plaintiff, and that through, over and across the northeast portion of said farm, from the south, in a northerly direction, an ancient stream, slough or water-course was wont to run and flow in its natural channel, without obstruction or interruption, whereby, from time immemorial, said premises had been and ought to be drained and kept in good, tillable condition, and free from all injurious and damaging excess of water, yet the defendants, well-knowing the premises, but contriving and intending to injure the plaintiff in his said reversionary estate and interest, on the 1st day of March, 1879, at said county, wrongfully and injuriously, with a certain line or track of railroad, commonly called the "Kankakee & Seneca Railroad," and the trenches, bridges and embankments thereof, by the defendants then and there built over, through and across said farm, and said ancient stream or water-course obstructed and impeded, and so narrowed and filled up the natural channel of said stream or water-course that on the day aforesaid, and from thence hitherto, said channel has been and is permanently incapable of carrying off large and divers quantities of water that were at the date aforesaid, and at divers other times between that day and the commencement of this suit, and will be from time to time upon said farm in the future, as it was wont to do, and otherwise would do. The sixth count alleges that by means of said railroad, and the grades, embankments, bridges, culverts, cuts and trenches thereof, by the defendants then and there constructed, maintained and kept up, the defendants have wrongfully, unjustly and permanently diverted the water of said ancient stream, slough or water-course from its natural channel towards, to and upon the said farm of the plaintiff. Each of said counts alleges that by means of the premises the plaintiff has been injured in his said reversionary interest and estate. The third and fourth counts allege that the plaintiff now is, and at and before the commission by the defendants of the grievances therein

complained of, and ever since has been, the owner in fee of said farm, with the appurtenances, and that said farm was of great rental value, to-wit, an annual rental value of \$5,000, and, after averring the existence and description of said water-course as in the other counts, allege that the defendants, well-knowing, etc., at the date aforesaid permanently diverted the water of said stream, slough or water-course from its natural channel to and upon said premises, and thereby then and there permanently injured the plaintiff in his said estate. The fifth count alleges that at the time of the commission of the grievances complained of the plaintiff was, and ever since has been, the owner of said farm, with the appurtenances, and that said premises then were, and ever since have been, in the possession and occupation of said Frank Horan, the reversion thereof then and there belonging to the plaintiff, and that the defendants, with said line or track of railroad, and the trenches, bridges and embankments thereof, by the defendants then and there built and constructed over and through said premises, and the said ancient stream, slough or water-course, by means whereof the water therefrom now does, and from time to time in the future, will permanently leave its channel and course, and run to, towards and upon, and overflow said premises, whereby the plaintiff has been and is greatly and permanently injured in his said reversionary interest and estate in and to said premises.

The defendants severally pleaded not guilty, and at the trial the jury found both the defendants guilty, and assessed the plaintiff's damages at \$7,200. For this sum
Verdict. and costs the circuit court, after denying the motions severally entered by the defendants for a new trial and in arrest of judgment, gave judgment in favor of the plaintiff. The defendants having appealed to the appellate court, the plaintiff there voluntarily remitted from his judgment the sum of \$3,200, and said court thereupon affirmed said judgment for \$4,000 and costs; and by a further appeal the defendants have now brought the record to this court for review.

The facts developed at the trial, so far as it is material to notice them here, are briefly as follows: The plaintiff is, and
Facts. for many years has been, the owner in fee of a farm consisting of the S. W. $\frac{1}{4}$ and the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 32, in the town of Braceville, Grundy county. Said farm, during the entire period of time covered by the present controversy, was in the actual possession of Frank Horan, the plaintiff's son, under an arrangement by which he was permitted by the plaintiff to occupy, use, and cultivate

the farm for his own benefit, without rent; the term of the tenancy being left wholly indefinite, thus constituting it a mere tenancy at will. Prior to 1881, the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company was owning and operating a line of railway running from Cincinnati, Ohio, to Kankakee, in this state, the westerly terminus of said line being at Kankakee, and said company then being in the habit of running its trains from Kankakee to Chicago over the Illinois Central Railroad by virtue of some arrangement with the company owning that road. The Kankakee & Seneca Railroad Company was thereupon organized on the 22d day of February, 1881, for the purpose of building a railroad connecting with the road of the Cincinnati Company at its terminus at Kankakee, and running from that point to Seneca, a station on the Chicago, Rock Island & Pacific Railway, and there connecting with that line of railway. Said proposed line of railway was built and completed during the years 1881 and 1882, nominally at least, by said Kankakee & Seneca Railroad Company; and immediately after its completion it was taken possession of and has ever since been in the possession of, and been operated, used, and controlled by, the Cincinnati Company. There was considerable evidence—most of it circumstantial, however,—tending to show that the Kankakee & Seneca Company was organized, and said road built, at the instance and in the interest of the Cincinnati Company, and was but a mere instrument created and used by the last-named company for the construction of a railroad extending its then existing line so as to connect with the line of the Rock Island Company at Seneca. The right of way for said railroad across the plaintiff's farm was conveyed by the plaintiff to said Kankakee & Seneca Railroad Company by deed. Said railroad crosses said farm in a south-easterly and north-westerly direction, crossing the north line of the farm about 40 rods east of the north-west corner, and crossing the east line about 30 rods north of the south-east corner, thus dividing the farm into two unequal portions; the southerly part containing about 170 acres, and the northerly part about 70 acres. The stream or water-course in question, known as the "Parker Slough," rises at a point several miles south of said farm, and, running north-easterly, crosses the line of the railroad at a point about 80 rods east of the south-east corner of the farm, and then, taking a north-westerly direction, crosses the east line of the farm about 25 rods south of the north-east corner, and thence, making a slight curve, returns and emerges from the said farm near said corner. The surface of said farm, and of the surrounding region, is low, and nearly level; and

the railroad, from the point where it enters the farm, near the north-west corner, to the place where it crosses the slough, constitutes an embankment from 2½ to 3 feet in height. The railroad crosses the slough by a bridge built upon piles driven into the ground. Another, smaller slough, situated some distance east, rises south of the farm, and runs northerly across the south-east corner of the farm, and crosses the line of the railroad at a point near where the railroad crosses the east line of the farm, and there is constructed another bridge similar to the one over the other slough. In constructing the railroad embankment a ditch was excavated along the southerly side of the embankment, about 1½ feet in depth, and from 15 to 20 feet in width. This ditch was carried easterly nearly to the Parker slough, a few feet only of earth being left between the end of the ditch and the slough. There was evidence tending to show that the openings through the railroad embankment under the bridge were not sufficient to carry off and discharge the water in the Parker slough in times of high water, and that large quantities of water were consequently dammed up so as to set back upon and flood the portion of the farm south of the railroad; also, that the water cut a channel through the earth left between the Parker slough and the railroad ditch, and that large quantities of water were thereby let into said ditch, and carried easterly so as to flood the farm.

All of the controverted questions of fact in the case being conclusively settled by the judgment of the appellate court, we must regard the allegations of the declaration as to the improper and insufficient construction of the railroad embankment, trenches, and bridges, and their incapability of carrying off the water naturally flowing into and through said slough or water-course, as established, and not open to investigation here. We must also regard it as settled that, in consequence of the improper construction of said railroad and its appurtenances, the waters in said slough have been and will be dammed up, set back, and diverted to and upon the plaintiff's farm, in a manner and form as is alleged in the declaration, and that the plaintiff has thereby suffered damages to his estate in reversion to the amount of the judgment.

It must also be regarded as settled that the Cincinnati Company was a joint actor with the Kankakee Company in the construction and maintenance of said railroad, **Liability of tort-feasors.** or so contributed to its construction and maintenance as to be liable to the plaintiff, jointly with that company, for the damages resulting therefrom. The rule of law is that all who contribute to a tort, even by their wills alone, and especially, therefore, all who contribute by their

acts, even though in an inferior degree, are, whether they are personally present or absent at the doing, liable to the person injured, each for the entire damages. Bish. Non-Cont. Law, § 522. The evidence clearly tended to show such complicity on the part of the Cincinnati Company; and the finding of the jury, confirmed by the judgment of the circuit and appellate courts, conclusively establishes its contribution both to the creation and maintenance of said nuisance in such manner as to render it liable.

The first error of law complained of is the overruling by the circuit court of the defendants' motion in arrest of judgment: such motion being based upon the allegation that the declaration states no cause of action for damages to the plaintiff's reversionary interest. In four counts of the declaration the plaintiff claims an estate in reversion in the farm in question after the expiration of the tenancy of his son Frank

Sufficiency of
complaint—
Damages to
reversionary
estate.

Horan, who was then occupying the farm as his tenant. Said counts then alleged the construction and maintenance by the defendants of a railroad and its appurtenances, consisting of a permanent embankment, ditches, bridges, etc., by means of which the waters of said slough or water-course are and will be permanently dammed up, diverted to, and caused to set back upon, and overflow, said farm, thus creating a continuing and permanent nuisance to and upon said farm. It is then alleged that by reason of said nuisance the plaintiff has suffered injury and damage to his estate in reversion. We are unable to understand how the declaration can be held to be defective in the particular here pointed out. If we rightly comprehend the contention of the defendants' counsel, it is that the damages alleged are solely to the possession; and as it is not alleged that the tenancy has terminated, or how long it will continue, it does not appear that the plaintiff has been, or ever will be, damaged, so far as his estate in reversion is concerned. This position is manifestly untenable. An injury to land which is permanent in its nature is necessarily an injury to the entire estate, and that includes the estate in expectancy as well as the estate in possession. An allegation of a permanent injury to land necessarily imports damage in some amount to the reversion. Undoubtedly, the estate in possession, its nature and duration, and the amount of rent reserved, if any, are material matters to be considered in the assessment of damages in favor of the owner of the reversion; but they are quite immaterial where the question is merely as to the sufficiency of the declaration to show a cause of action, or to warrant the recovery of any damages. It cannot be doubted that the roadbed, embank-

ments, trenches, bridges, culverts, and other appurtenances of a railroad constructed and maintained in pursuance of lawful authority are to be regarded in law as permanent structures. This is not so because it is certain that they will in fact continue to subsist in their present condition forever, or that they are not liable to be changed in many respects by the proprietors of the railroad whenever they may see fit, or by natural causes; but it is so because the railroad company has a legal right to maintain them perpetually, and because no other party has, or can have, a lawful right to interfere with or change them in any respect. It is for this reason that when a railroad company lawfully appropriates land for the construction of its road, such appropriation is a permanent one; and, in case other property is damaged by its construction or maintenance, such damage is in its nature equally permanent. It is therefore held that where deterioration of the value of land is occasioned by a nuisance created by the construction of a railroad, such nuisance is a permanent one, so that all damages for past and future injury to the property may be recovered in one suit, and such recovery is a bar to all future actions therefor. *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 27 Am. & Eng. R. Cas. 415.

The next point made is that the court submitted to the jury an incorrect rule of damages. The measure of damages, as laid down by the plaintiff's fourth instruction, was, "the depreciation in the market value of said farm by reason of said alleged overflow." It is said that this did not limit the plaintiff's recovery to such damages as had accrued to his reversionary interest. Whether this is so or not must depend upon the nature and extent of that interest. If the tenancy of Frank Horan was of such a nature that the plaintiff was at liberty at any instant to terminate it, and thus convert his reversion into an estate in possession, the rule of damages adopted by the instruction would not seem to be improper. That such was the character of said tenancy is conclusively shown by the evidence. The only witness testifying on the subject was the tenant himself, and he swears that he went into and held possession under a verbal permission by his father to take possession of and cultivate the farm for his own benefit, and make what he could out of it; no time being fixed for the duration of such possession, and no rent being reserved, agreed upon, or in fact paid. This was clearly a tenancy at will, which was subject to be terminated at any instant at the will of the lessor: such right to terminate it being subject only to the tenant's right to the emblements, in case there were grow-

ing crops at the time, Such tenancy is manifestly not such an estate as should necessitate an apportionment between it and the reversion of the damages arising from a depreciation of the market value of the land.

Complaint is made of various rulings of the court in the admission and exclusion of evidence. Several witnesses were asked and permitted to give their opinion as to the market value of the plaintiff's farm before and after the railroad was built, and to state that the depreciation in values shown by their testimony was caused by the overflow of water resulting from the construction of the railroad. This evidence was properly admitted. The depreciation in the market value of land arising from a permanent injury thereto is the proper measure of damages to the owner. *Dupuis v. Chicago & N. Wis. R. Co.*, 115 Ill. 97, 23 Am. & Eng. R. Cas. 93. *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241; *Chicago & I. R. Co. v. Baker*, 73 Ill. 316; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *Chicago & E. I. R. Co., v. Loeb*, *supra*.

Damages—Admissibility of evidence.

Complaint is also made of the admission in evidence of certain maps or plats of the premises in question. Said papers were identified by witnesses, and shown to be substantially correct, and we think there was no error in submitting them to the jury, to be considered in connection with the other evidence in the case.

Maps and plats—Admissibility.

It is claimed that the court erred in permitting the plaintiff's counsel to read in evidence a portion of the defendant's petition for a change of venue. It appears that at some time previous to the trial a petition on behalf of the defendants for a change of venue, verified by the affidavit of Joseph W. Sherwood, who at the time was the superintendent of both defendants, was filed. The passage from said petition read to the jury was as follows: "Said railroad was constructed in the year 1881, and operated most of the time since by said Cincinnati, Indianapolis, St. Louis & Chicago Railway Company." Without pausing to determine whether the statements of said petition are competent evidence against the defendants,—of which, however, we do not think there can be much doubt,—the defendants cannot have been materially prejudiced by the admission of the passage read in evidence, as there seems to be an abundance of evidence *aliunde* of both the facts therein stated, and neither seems to have been the subject of any considerable controversy. In is conceded on all hands that the railroad in question was constructed in 1881, or in that year and the early part of the year following: and

Petition for change of venue—Harmless error.

it does not seem to be disputed that the Cincinnati Company is now operating said road, and has been doing so ever since it was completed.

Again, it is urged that the court erred in admitting in evidence the bill of complaint in a certain suit brought in the circuit court of the United States for the northern district of Illinois by the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, against the plaintiff in this suit and said Frank Horan, to enjoin the plaintiff from prosecuting this suit, and to enjoin said Frank Horan from prosecuting another suit against said complainant and said Kankakee Company to recover damages for injuries to his crops growing on said farm by reason of being flooded with water. Said bill of complaint related to the same subject-matter in litigation here, and contained various averments as to matters of fact involved in the present suit. It was therefore competent evidence of admissions by the plaintiff therein, and there was no error in allowing it to be read to the jury.

It appeared that said bill was demurred to in the court where it was filed by the defendants thereto, and it is insisted that said demurrer should have the effect here of an admission that the allegations of the bill are true.

Demurrer to bill.

This cannot be conceded. The demurrer, it is true, was an admission of the truth of such matters in the bill as were well pleaded; but it was such admission only for the purpose of obtaining the judgment of the court as to the sufficiency of the bill on its face to entitle the complainant to relief, or rather, it was a pleading by which the defendant demanded the judgment of the court whether he should be compelled to answer the bill or not. Story, Eq. Plead. § 436. For no other purpose can it be held to be an admission of the allegations in the bill, unless it appears, as it does not here, that, the demurrer being held insufficient, the defendant elected to abide by his demurrer, and permitted a decree to go against him upon the facts thus admitted.

Error is also assigned upon the refusal of the court to permit the defendants to read to the jury from the bill of exceptions taken at a former trial the testimony of one Moran, who was a witness at that trial, but who has since died. To this point there are two answers, either of which is sufficient: (1) The testimony of a deceased witness given on a former trial cannot be shown by the bill of exceptions taken at that trial, and it is therefore not error to refuse to permit his testimony to be proved in that mode. *Roth v. Smith*, 54 Ill. 431; *Stern v. People*, 102 Ill. 540. (2) The testimony of the deceased

Testimony of deceased witness at former trial.

witness is not preserved in the present record, and there is therefore nothing from which we can determine whether said testimony was material or not. *Smith v. Heirs of Jackson*, 76 Ill. 254.

Complaint is also made of the refusal by the court to admit in evidence two mortgages executed by said Kankakee Company to M. E. Ingalls and R. R. Cable, as trustees, conveying its railroad and appurtenances. The first mortgage was dated July 1, 1881, and purported to secure 600 bonds of the mortgagor, of \$1,000 each. The second mortgage was dated July 1, 1882, and recited that the holders of the bonds secured by the first mortgage had advanced to the mortgagor an additional \$50,000, and had agreed to accept a new series of 650 bonds of the same denomination; and said second mortgage therefore purports to be given to secure said second series of 650 bonds, one-half of them payable to said Cincinnati Company, and the other one-half to said Rock Island Company. We are unable to see any legitimate purpose for which said mortgages could be material as evidence. They were probably offered to show that the Kankakee Company was the principal actor in the construction of said railroad; but it is manifest that the execution of said mortgages were not acts forming any part of the *res gesta* of the construction of the road, and that both the execution of the mortgages and the recitals therein contained are purely *res inter alios acta*, and therefore not competent evidence as against the plaintiff in this suit. The only theory suggested in support of their materiality is that they might tend to repel the inference arising from the fact that the Kankakee Company was organized with a capital stock of only \$10,000; that it had no means, and therefore could not have constructed said railroad. The material question, so far as that aspect of the case is concerned, is whether that company did in fact build the road; and showing that it had control of the requisite funds would not tend to establish that fact, in the absence of evidence tending to show the specific appropriation of such money to the purpose of building it. But the plaintiff's right to recover against the Cincinnati Company does not rest upon the theory that the Kankakee Company was not the organic instrument by which the road was constructed. It may be admitted that the road was built by that company with moneys obtained by mortgaging the road, and that the legal title to the road and its appurtenances is, and always has been, in that company, and still those facts do not repel the inferences legitimately arising from the evidence that the Cincinnati Company counseled, contributed to, and assisted in the enterprise, in such manner as to be

Admissibility
of mortgage.

jointly liable with the Kankakee Company for the consequences of the wrongful, negligent, or improper construction of the road. Even the mortgages in question, if they had been received in evidence, would, in connection with the other circumstances in proof, have furnished very suggestive corroboration of the theory that the Kankakee Company was organized and designed as a mere instrument in the hands of the Cincinnati Company for the construction of a line of railroad for the use, and to subserve the purposes, of that company; said company being in fact the real and ultimate principal in the enterprise. It cannot be doubted that if said company had employed a natural person to do, for its use and advantage, just what the Kankakee Company has done, it would be liable jointly with him for his torts, or perhaps the case might call for an application of the maxim, *respondeat superior*. There is no magic in a corporate organization, where the corporation is in fact employed for the accomplishment of the same result, which can exempt the employer from the same responsibility.

A number of errors are assigned upon the rulings of the court in giving and refusing instructions to the jury. Four instructions were given at the instance of the plaintiff, upon each of which the defendant's counsel has bestowed some degree of criticism; but we find nothing in the points raised which makes it necessary for us to do more than to say that, so far as we are able to see, said instructions state the law applicable to the case with substantial accuracy. A large number of instructions were asked on behalf of the defendants, some of which were given as asked; others were given after being slightly modified by the court; and others were refused. We find no material error in any of the modifications of the instructions given, and of those refused, only one, the thirteenth, seems to us to merit particular discussion.

Duty of railroad company to provide for drainage.

That instruction is as follows: "(13) If the jury find from the evidence that the outlet for the water of the Parker slough, constructed on, or near the east line of Bertrand D. Parker's land afforded as good facilities for the discharge of the water running through said slough as were afforded by said slough before said railroad was constructed, and the course of said water-course interfered with, then neither of said defendants are liable in this action for any damages resulting to the plaintiff by waters flowing from said Parker's slough over the premises occupied by him by reason of the trestle and opening at said locality; and if the jury find from the evidence that, in consequence of the artificial ditches, cuts, and other excavations made by neighboring landowners since the construction

of the railroad, the amount of water discharged into the Parker's slough, and which flowed therefrom onto the premises of the plaintiff, was increased, and exceeded in amount the waters which flowed through said slough before the railroad was constructed, and said water-course interfered with, neither of the defendants in this case are liable for any damages done by said excessive flowing of the water over said slough, over the premises occupied by the plaintiff, providing nothing was done in the construction of the railroad or in connection therewith, to diminish the flow of water through the Parker slough, or to diminish the capacity of the Parker slough to convey water, or to increase the flow of water from the Parker slough onto the plaintiff's land." The first proposition contained in the instruction is repeated, in substance, in the defendants' second instruction, which was given; and so, whether erroneous or not, it requires no further comment, as its refusal here furnishes the defendants with no ground of complaint. As to the residue of the instruction, we are inclined to concur with the view taken by the appellate court. That court, in holding the instruction erroneous, said: "It in substance tells the jury that the appellants, when fixing the culvert for the passage of the water of the Parker slough, a natural water-course, was only bound to so construct it that it was no obstruction to the water then flowing into it; but, as to any increase of water caused by the drainage into it by people along the course of the slough, the appellants would not be liable though the culvert was not sufficient to admit of the passage of such water. We do not subscribe to this doctrine. The Parker slough was a water-course, and it was the legal right of any one along its line, for miles above the railroad, where the water naturally shed toward the slough, to drain into it; and no one below, owning land along the slough, would have any legal remedy against such person so draining water into the slough above him for any damage done to his inheritance by means of an increased flow of water caused thereby. In other words, the slough was a legal water-course for the drainage of all the land, the natural tendency of which was to cast its surplus water caused by the falling of rain and snow into it; and this whether the flow was increased by artificial means or not. It would seem legitimately to follow that the railroad company, in providing a passage-way for the slough, was bound to anticipate and provide for any such legal increase of the water-flow. If it did not, it was doing a wrong and legal injury to any one situated like the appellee, who received injury in consequence of a failure on its part to do its duty." 30 Ill. App. —. After considering the entire record, we find no material error, and

the judgment of the appellate court will therefore be affirmed.

Liability of Parent Company for Negligence of Auxiliary Company.—See *Atchison, T. & S. F. R. Co., v. Davis* (Kan.), 25 Am. & Eng. R. Cas. 305, note 312.

Construction of Bridges—Liability of Company for Overflow.—See *Taylor v. Baltimore & O. R. Co.* (W. Va.), 39 Am. & Eng. R. Cas. 259; note 275; *McCleneghan v. Omaha & R. V. R. Co.* (Neb.), 37 *Id.* 245, note 253.

SABINE & EAST TEXAS R. CO.

v.

BROUSSARD.

(*Texas Supreme Court, January 17, 1890.*)

Construction of Road—Obstruction of Drainage—Instructions.—An instruction in an action for damages for an overflow alleged to have been caused by the improper construction of a railroad, that the jury should consider whether the water on the land inclusive of what might fall as rain water and what was there as overflowed water, would have run off the land in the natural course of drainage without the injury complained of, if defendant's roadbed had not been constructed as it was, is not erroneous as authorizing the jury to take into consideration sources of overflow not alleged in the plaintiff's petition.

Same—Duty of Company—Instructions.—An instruction in such an action that the jury should consider whether the damage would have occurred if the embankment or roadbed had been so constructed as to properly drain the country, is not open to the objection that the duty of the defendant was to so construct its roadbed and embankment as not to impede natural drainage, and that the instruction imposed a greater duty upon it.

APPEAL from District Court, Hardin County.

Action by Moise Broussard against the Sabine & East Texas R. Co. for damages to plaintiff's land by an overflow caused by the improper construction of the defendant's railroad. The defendant assigned among other errors, that the court erred in instructing the jury that, "in determining the question of defendant's liability to plaintiff for damages, if any, you will consider the question whether or not the amount of water on the land south of Taylor's bayou, inclusive of what may have fallen as rain-water and what was there as overflow water, would have run off the land in its natural course of drainage, without the injury complained of, if the defendant's roadbed embankment had not been, as alleged, constructed in the form and manner as alleged by plaintiff; and you may consider whether, if plaintiff has shown that he has sustained the losses and damages alleged, it would have occurred if the embankment or roadbed of defendant had been so constructed

as to properly drain the country south of Taylor's bayou into Sabine lake and pass,—in that the jury was not thereby confined to the sources and character of overflow alleged in plaintiff's petition, and the charge imposes upon the defendant, as a duty, the construction of its roadbed and embankment so as properly to "drain the country" south of Taylor's bayou "into Sabine lake and pass," whereas the duty of defendant was to so construct its roadbed and embankment as not to impede the natural drainage of said section of country.

O'Brien & John for appellant.

Tom J. Russell for appellee.

HENRY, J.—This suit was brought by appellee to recover of appellant damages. Plaintiff claims that defendant so negligently constructed its railroad bed, all the way from Taylor's bayou to the town of Sabine Pass, that when, in January, 1885, there came heavy rains, such as are usual to that region, the water overflowed the south bank of the bayou, and was obstructed in its natural flow toward Sabine lake by said railroad bed, and dammed up, and caused to accumulate and stand at a great depth upon plaintiff's land for several months, destroying the grass, and causing the death of plaintiff's horses and cattle then being pastured upon said land. There was a verdict for plaintiff.

Case stated.

Appellant's first assignment of error is that the court erred in making comments upon the testimony of defendant's first witness during said trial, in the presence and hearing of the jury, to the effect following, to wit: "The last half-hour, he thought, had been unnecessarily consumed, and was not calculated to enlighten court or jury." It appears that these remarks were not excepted to at the time they were made, nor until after the court had adjourned for the day. When the remarks are considered in connection with the evidence of the witness, and the subsequent charge of the court, by which the jury were told that they were the judges of the weight to be attached to the testimony, and that it was not the province of the court to pass on that question, or to express an opinion as to the value of the testimony admitted, but they were to be controlled by their own views, we do not think the jury could have been improperly influenced by the remarks. The proper time to have taken the exception was when the remarks were made, and in the presence of the jury. If the objection had been made, an opportunity would have been furnished the court to have removed any improper effect that they were likely to produce by proper explanations to the jury. Not having been then taken, the objection ought not to be considered now.

Comments on testimony.

The remaining assignments of error relate to charges given and refused by the court, and to the sufficiency of the evidence to support the verdict. The charge of the court furnished the jury with a full, clear, and correct exposition of the law applicable to the issues made by the pleadings and evidence; and the findings of the jury are sufficiently supported by the evidence. The case was once before this court, and was reversed and remanded. 34 Am. & Eng. R. Cas. 199. The trial from which this appeal is taken appears to have been conducted in accordance with the opinion then expressed. The judgment is affirmed.

KERIGAN

v.

SOUTHERN PACIFIC R. CO. *et al.*

(California Supreme Court, November 22, 1889.)

Passengers—Connecting Lines—Liability for Injury.—Where a person has purchased and accepted a coupon return ticket containing a notice that the company selling it acts only for itself over its own line and as agent for the other lines specified on the coupons but assumes no responsibility beyond its own line, and the purchaser travels upon such ticket to his destination and back again, the company selling the ticket is not responsible for injuries sustained upon a connecting railroad.

APPEAL from Superior Court, City and County of San Francisco.

W. H. L. Barnes for appellant.

B. McKinne and *George B. Gillen* for respondents.

PER CURIAM.—Action for damages for bodily injuries received by plaintiff through the alleged negligence of defendants while carrying plaintiff as a passenger on

Case stated. a stage-coach from Gilroy Hot Springs to Gilroy.

Both defendants answered, but at the trial the defendant corporation only appeared, and, after the plaintiff closed his case, it moved for and obtained a nonsuit as to itself. The case was then given to the jury, who returned a verdict for plaintiff against defendant Paine. From the judgment of nonsuit plaintiff appeals.

The facts are as follows: On the several dates hereinafter mentioned, the respondent corporation owned and was operating a steam railroad for the carriage of passengers and baggage between San Jose and Gilroy in either direction, and the defendant Paine was the

Facts.

owner of and operating a stage line between Gilroy and Gilroy Hot Springs for the carriage of passengers and baggage in either direction. On the 23d of June, 1885, the plaintiff purchased of the respondent a round-trip special excursion ticket from San Jose to Gilroy Hot Springs and return to San Jose, entitling him to transportation over the railway and stage line above mentioned. The ticket was in the form of a coupon ticket, and had three coupons attached to it. The first provided for one continuous passage from San Jose to Gilroy; the second, for one passage from Gilroy to Gilroy Hot Springs; the third, for one passage from Gilroy Hot Springs to Gilroy; and the main ticket, for one continuous passage from Gilroy to San Jose. Among other matters not material here, the ticket contained on its face the following: "Issued by the Southern Pacific Railroad Company, acting for itself over its own line, and as agent for the line named in the accompanying checks, but assuming no responsibility beyond its own line. * * * In consideration of this ticket being sold at a reduced price from the regular first-class rate, it is hereby understood and agreed upon by the purchaser that it will not be good for passage after October 31st of the year indicated by agent's punch mark in the margin, that it is not transferable, and no stop-over privileges will be granted." These conditions were referred to in each of the coupons. On the 27th day of June, 1885, when the appellant was returning from Gilroy Hot Springs to Gilroy, upon said ticket, as a passenger, on a stage-coach of the stage line belonging to the defendant Paine, the stage-coach, while descending a steep grade on the road, and making a sharp turn around a bank on one side, was upset against the bank, solely through the negligence of the driver, and the appellant was crushed between the bank and stage-coach and severely injured. The claim of appellant is that the respondent, by selling him the ticket from San Jose to Gilroy Hot Springs, via Gilroy, and return to the first place, undertook, as principal, to transport him over the connecting stage line from Gilroy to Gilroy Hot Springs and back to Gilroy, and is liable as such principal for the default of the owner of the stage line.

Doubtless, a railway company may so issue tickets to places beyond its own line, and so control the transportation of its passengers as to be held to have contracted for the entire distance, and, in consequence, be answerable in damages for negligence occurring on any one of the connecting lines. Such is the effect of the following cases, cited by appellant, viz.: *Great Western R. Co. v. Blake*, 7 Hurl & N. 987; *Buxton v.*

Liability for
injury on
connecting
line.

North Eastern R. Co., L. R. 3 Q. B. 549; *Ward v. Vanderbilt*, 4 Abb. Dec. (N. Y.), 521; *Williams v. Vanderbilt*, 28 N. Y. 217; *Van Buskirk v. Roberts*, 31 N. Y. 671; *Quimby v. Vanderbilt*, 17 N. Y. 307; *McElroy v. Nashua & L. R. Co.*, 4 Cush. (Mass.) 400; *Schopman v. Boston & W. R. Co.*, 9 Cush. (Mass.) 24; *McLean v. Burbank*, 11 Minn. 277; *Carter v. Peck*, 4 Sneed (Tenn.), 203; *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46. But we understand the rule to be that where there are several connecting lines, the plaintiff seeks, as in the present case, to recover of one for an injury received upon another of the connecting lines, he must establish a contract with the line he endeavors to hold, or that it had some interest in, or control over, the transportation of passengers by the line in default. *Wylde v. Northern R. Co.*, 53 N. Y. 156; *Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208; *Pennsylvania R. Co. v. Connell*, 18 Am. & Eng. R. Cas. 339; *Hartan v. Eastern R. Co.*, 114 Mass. 44; *Brooke v. Grand Trunk R. Co.* 15 Mich. 332; *Knight v. Portland, S. & P. R. Co.*, 56 Me. 234; 2 Redf. R. R. (6th Ed.) 313, 314. Do the facts in the present case show a contract between the appellant and respondent whereby the latter undertook to carry the former to Gilroy Hot Springs and back again to San Jose? The only evidence upon this point is that the appellant purchased, paid for, and accepted the ticket containing the notice and conditions above set forth, and that he rode upon it from one of the termini to the other and back again. There is not a word to show that the respondent undertook differently from what appears upon the face of the ticket. The sections of the Civil Code cited by appellant refer only to contracts of railroad companies for carriage over their own lines. The nonsuit was properly granted, and the judgment is affirmed.

Passengers—Responsibility of Contracting Company for Accident Happening upon Connecting Line.—See *Washington v. Raleigh & G. R. Co.* (N. Car.), 37 Am. & Eng. R. Cas. 25, note 32; *Chollette v. Omaha & R. V. R. Co.* (Neb.), 37 *Id.* 16.

REESE

v.

PENNSYLVANIA R. CO.

(Pennsylvania Supreme Court, January 6, 1890.)

Passengers—Failure to Procure Ticket—Additional Charge.—A regulation which requires passengers who fail to procure tickets before entering the train, to pay an additional charge of 10 cents which they should be entitled to have refunded upon presentation at any ticket office of a check delivered to them by the conductor, is not unreasonable or oppressive, or needlessly inconvenient to the traveler.

Same—Fare—Statutory Limit.—Such additional charge is not “a charge for transportation” within the meaning of a statute limiting the rate of fare which may be charged for the carriage of passengers.

Same—Validity of Regulation—Partiality.—Such a regulation is not unfair and partial in its operation because it provides that passengers entering the train at stations where there is no ticket office and passengers traveling on trains where, on account of the excessive rush of business, it is impossible to issue the refunding checks, shall not be required to pay the additional charge.

ERROR to the Court of Common Pleas, Allegheny County.
Trespass by L. B. D. Reese against the Pennsylvania R. Co. for damages for the unlawful expulsion of the plaintiff from defendant's train. The plaintiff took passage from East Liberty in the city of Pittsburgh, but as he did not arrive at the station in time to procure a ticket, he got upon the train without having any, though the ticket office was open at the time of the departure of the train. Plaintiff's destination was the Union depot in Pittsburgh, a distance of four and a half miles, and the regular fare for that distance was 14 cents, being three cents per mile. By one of defendant's regulations, passengers who did not obtain tickets at the ticket office were required to pay an additional charge of 10 cents in addition to the regular fare. In exchange for the charge so made “duplex tickets” were given to passengers which were redeemable at 10 cents on presentation at any ticket office of the company. Plaintiff when asked for a ticket, tendered the conductor the regular fare of 14 cents. The conductor demanded 24 cents, and upon the plaintiff declining absolutely to pay more than 14 cents, he was requested to leave the train and did so. The court refused to grant the defendant's first request to charge, which was in the following terms: “Under the uncontradicted evidence in this case, the regulation of the defendant was a reasonable one and the plaintiff, who was insisting on riding in violation

thereof, has no cause of action, and the verdict should be in favor of the defendant." The jury returned a verdict for the plaintiff for \$250. The defendant sued out a writ of error.

John H. Hampton, William Scott and George B. Gordon for appellant.

Levi Bird Duff and N. C. Johnston for appellee.

MITCHELL, J.—The right of railroad companies to make reasonable regulations, not only as to the amount of fares, but as to the time, place and mode of payment, is unquestionable. This right includes the right to refuse altogether to carry without the previous procurement of a ticket. *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. St. 373. That case arose upon a special regulation as to the carriage of passengers upon freight trains; but there is no appreciable distinction between it and a general regulation as to all passengers. Both rest on the common-law principle that requires payment or tender as an indispensable preliminary to holding a carrier liable for refusal to carry, and on the manifest and necessary convenience of business where the number of passengers is liable to be large, and the time for serving them short. So, too, the authorities are uniform that companies may charge an additional or higher rate of fare to those who do not purchase tickets before entering the cars. *Crocker v. New London, W. & P. R. Co.*, 24 Conn. 249; *Swan v. Manchester & S. R. Co.*, 132 Mass. 116, 6 Am. & Eng. R. Cas. 327; *Hilliard v. Goold*, 34 N. H. 241; *Stephen v. Smith*, 29 Vt. 160; *State v. Goold*, 53 Me. 279; *State v. Chovin*, 7 Iowa, 208; *Du Langers v. First Div. St. Paul & P. R. Co.*, 15 Minn. 49; *State v. Hungerford*, 39 Minn. 6, 34 Am. & Eng. R. Cas. 265, and note; *Chicago B. & Q. R. Co. v. Parks*, 18 Ill. 460; *Pullman Palace Car Co. v. Reed*, 75 Ill. 130; *Cincinnati, S. & C. R. Co. v. Skillman*, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31; *Forsee v. Alabama G. S. R. Co.*, 63 Miss. 67. And it may be noted, in response to one of the most urgently pressed arguments of the defendant in error, that the reasons almost uniformly given in support of this long line of decisions include the furthering of the honest, orderly and convenient conduct by the railroad company of its own business. The regulation in question in the present case is not in itself unreasonable or oppressive. In regard to the traveler, it is scarcely just ground of complaint that he has to present his refunding ticket at the end of his journey, instead of getting an ordinary ticket at the start. The inconvenience, if any, is the result of his own default. With reference to the other

Regulations
requiring
ticket to be
procured.

passengers, and still more to the railroad company, the regulation is conducive to the rapid, orderly and convenient dispatch of the conductor's part in the collection of fares, and thus to leaving him free for the performance of his other duties in connection with the stops at stations, the entrance and exit of passengers, and the general supervision of the safety and comfort of those under his care. If, therefore, the company may refuse to carry at all without a ticket, it may fairly refuse under the far less inconvenient alternative to the traveler of putting him to the trouble of going to an office to get his excess refunded. If the company may charge those failing to get a ticket an additional price, and keep it, certainly they may charge such price and refund it; and, as the regulation is not in itself unreasonable or oppressive, or needlessly inconvenient to the traveler, its validity, upon general principles and on authority, would seem to be beyond question.

These views were conceded by the learned judge below, and are not seriously questioned by counsel here; but the decision was based upon the view that the extra 10 cents imposed by this regulation is a part of the fare, and makes it higher than the rate allowed by the act of incorporation of the company. The language of the act is: "In the transportation of passengers no charge shall be made to exceed * * * three and a half cents per mile for way passengers." As the distance from East Liberty station to the Union depot in Pittsburgh is $4\frac{1}{2}$ miles, and the regular fare 14 cents, it is admitted that the extra 10 cents is in excess of the charter rate, if it is a "charge for transportation" within the meaning of the act. Should it be so regarded? "Charge" is a word of very general and varied use. Webster gives it 13 different meanings, none of which, however, expresses the exact sense in which it is used in this charter. The great dictionary of the Philological Society, now in course of publication, gives it 20 separate principal definitions, besides a nearly equal number of subordinate variations of meaning. Of these definitions, one (106) is: "The price required or demanded for service rendered, or (less usually) for goods supplied;" and this expresses accurately the sense of the word in the present case. The essence of the meaning is that it is something required, exacted or taken from the traveler as compensation for the service rendered, and, of course, something taken permanently—not taken temporarily, and returned. The purpose of the restriction in the charter is the regulation of the amount of fare, not of the mode of collection; the protection of the traveler from excessive demands, not inter-

Statutory
limitation of
rate of fare.

ference with the time, place, or mode of payment. These are mere administrative details, which depend on varying circumstances, and are therefore left to the ordinary course of business management. We fail to see anything in the present regulation which can properly be treated as an excessive charge, within the prohibition of the charter.

Nor is there any force in the objection that this regulation is unreasonable. It is said not to be general, fair and impar-

Exceptions from operation of regulation.

tial, because it provides that as to passengers getting on the train at stations where there is no ticket office, etc., or on trains where, on account of the excessive rush of business, it is impossible to issue the refunding checks, the collection of the excess shall be omitted. The objection overlooks the necessary qualifications to the validity of such a regulation. All the cases are agreed that the regulation would be unreasonable, and therefore void, unless the carrier should give the passenger a convenient place and opportunity to buy his ticket before entering the train. This part of the regulation merely puts into express words a necessary exception, which the law would otherwise imply. So as to the excessive rush of business. Reasonableness depends on circumstances. To collect the extra amount and issue return checks to as many passengers as the conductor could reach in time, and let all others go free entirely, would be much more unreasonable than to treat all alike, and dispense with the regulation for the time being. Necessity modifies the application of rules, and there is nothing unreasonable in requiring the conductor to exercise sufficient foresight to see whether he can perform the prescribed duty in the available time, and investing him with the discretion to omit it altogether, if, in his judgment, he cannot perform it fully. No authorities precisely in point have been found upon either side. The cases cited by the defendant in error, from Kentucky and Ohio, are widely distinguishable, as they were cases of absolute charge beyond the charter limit, without any provision for return of the excess to the traveler. But on well-settled principles we are of opinion that the regulation is reasonable in itself, and not in violation of the restriction in the act of incorporation. The defendant's first point should therefore have been affirmed. Judgment reversed.

Regulations Requiring Purchase of Tickets for Passenger Trains.—See *State v. Hungerford* (Minn.), 34 Am. & Eng. R. Cas. 265, note 267; *Everett v. Chicago, R. I. & P. R. Co.* (Iowa), 27 *Id.* 98, note 101.

Same—Custom to Refund Amount Paid by Holders of Commutation Tickets.—The respondent issued commutation tickets for a stated number of trips within a specified time, subject to several conditions, one of which was

that the purchaser should have no claim for rebate on account of non-use of the ticket from any cause; another that it be presented to the conductor for cancellation of each trip when taken. A commuter had to pay the conductor full fare if he did not have his ticket, but in such cases the respondent had fallen into the habit of refunding the same on presentation of the ticket for cancellation of the trip at the proper office of the company. About three weeks prior to the complainant's purchase of his ticket, the respondent had discontinued this habit and had given notice to that effect in a new tariff sheet filed with the Interstate Commerce Commission and posted in the stations of the railroad as required by law on a change of tariff rates. *Held*, that it was not an unlawful discrimination to refuse to refund to the complainant who held such ticket, but had forgotten to take it on a certain trip and had paid his fare, notwithstanding he supposed the former custom was in vogue when he purchased his ticket.

It was a regulation of the respondent company, published on its public tariff schedules filed and posted as required by the Act to regulate commerce, that the conductor should collect fare on trains from passengers without tickets by adding 25 cents to single trip rates. *Held*, that it was not unjust discrimination against the complainant to exact this addition from him. *Sidman v. Richmond & D. R. Co.*, Interstate Commerce Commission, April 5, 1890.

Same—Quarterly Commutation Tickets—Refunding of Purchase Price.—The complainant purchased what the respondent termed a quarterly commutation ticket on the 13th day of June, specifying the number of trips that might be taken thereon as 180, but it provided that the term should expire on the 31st day of the following August, and this was known to the complainant when he made the purchase. It was similarly stated on each one of such quarterly tickets when it was to expire, viz; at the end of the third calendar month after it was issued. *Held*, that the complainant was not entitled to recover any portion of the purchase price for the thirteen days less than a full quarter. *Sidman v. Richmond & D. R. Co.*, Interstate Commerce Commission, April 5, 1890.

Purchase of Ticket—Duty of Company to Sell—Incorrect Information Supplied by Railway Officials.—In *McGillivray v. Grand Trunk R. Co.*, First Division Court of the County of York, Ontario, Feb. 24, 1890, the plaintiff sued to recover damages for failure to sell him a ticket. The plaintiff, who was a lawyer, intended to go to Newmarket to prosecute some cases pending in court. The ticket agent at Union Station, Toronto, declined to sell him a ticket until after the Hamilton train left. Because of this, he missed the Newmarket train and his cases went by default. He thereupon brought an action to recover damages, but it was held that he had no cause of action. MORSON, acting judge said: "This is an action brought by the plaintiff for damages by reason of the company's ticket agent at the Union Station, Toronto, declining to sell him a ticket to Newmarket until after the Hamilton passengers had purchased their tickets, thereby causing him to miss the Newmarket train. I cannot see how the plaintiff can succeed, unless there be a duty, statutory or otherwise, imposed upon the company to sell tickets. I am unable to hold that there is any such duty. The plaintiff could have purchased his ticket on the train and should not have waited as long as he did to purchase one from the agent, and thereby miss his train which he knew, or ought to have known, left at the time stated in the printed time-table. This time-table is the contract of the company with the travelling public. The statement that there was plenty of time, made by one of the officials of the company while the plaintiff was waiting to purchase his ticket, was a statement in my opinion, made in excess of his duty, and did not bind the company. The plaintiff should not have relied upon this statement but should have relied upon the time-table. There must be, therefore, judgment for the defendants with costs."

LOUISVILLE, NEW ORLEANS & TEXAS R. CO.

v.

STATE OF MISSISSIPPI.

(United States Supreme Court, March 3, 1890.)

Interstate Commerce—Validity of Statute Regulating Passenger Accommodations.—The Mississippi Statute of March 2, 1888, which provides that all railroads carrying passengers in the state shall furnish equal and separate accommodations for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger coaches, is not invalid as an interference with interstate commerce, since it operates only upon the carriage of passengers within the state. HARLAN and BRADLEY, J.J., dissenting.

ERROR to the Supreme Court of the State of Mississippi.

Indictment against the Louisville, New Orleans & Texas R. Co. for failing to provide separate accommodations on its trains for white and colored persons, as required by the Mississippi Act of March 2, 1888. The supreme court of the state affirmed a judgment convicting the defendant. See 39 Am. & Eng. R. Cas. 399. The defendant thereupon sued out a writ of error.

W. P. Harris for plaintiff in error.

T. M. Miller, Atty. Gen. of Mississippi, for defendant in error.

BREWER, J.—The question presented is as to the validity of an act passed by the legislature of the state of Mississippi on the 2d of March, 1888. That act is as follows:

Statute.

"Section 1. Be it enacted, that all railroads carrying passengers in this state other than street railroads, shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations. Sec. 2. That the conductors of such passenger trains shall have power, and are hereby required, to assign each passenger to the car or the compartment of a car, when it is divided by a partition, used for the race to which said passenger belongs, and that, should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and neither he nor the railroad company shall be liable for any damages in any court in this state. Sec. 3. That all railroad companies that shall refuse or neglect, within

sixty days after the approval of this act, to comply with the requirements of section one of this act, shall be deemed guilty of a misdemeanor, and shall upon conviction in a court of competent jurisdiction, be fined not more than five hundred dollars; and any conductor that shall neglect to, or refuse to, carry out the provisions of this act, shall upon conviction, be fined not less than twenty-five, nor more than fifty dollars for each offense. Sec. 4. That all acts and parts of acts in conflict with this act be, and the same are hereby, repealed; and this act to take effect and be in force from and after its passage." Acts 1888, p. 48.

The plaintiff in error was indicted for a violation of that statute. A conviction in the trial court was sustained in the supreme court, and from its judgment the case is here on error. The question is whether the act is a regulation of interstate commerce, and therefore beyond the power of the state; and the cases of *Hall v. De Cuir*, 95 U. S. 485, and *Wabash St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 26 Am. & Eng. R. Cas. 1, are specially relied on by plaintiff in error. It will be observed that this indictment was against the company for the violation of section 1, in not providing separate accommodation for the two races, and not against a conductor for a violation of section 2, in failing to assign each passenger to his separate compartment. It will also be observed that this is not a civil action brought by an individual, to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train; and hence there is no question of personal insult, or alleged violation of personal rights. The question is limited to the power of the state to compel railroad companies to provide, within the state, separate accommodations for the two races. Whether such accommodation is to be a matter of choice or compulsion does not enter into this case.

Question involved.

The case of *Hall v. De Cuir*, *supra*, was a civil action to recover damages from the owner of a steamboat for refusing to the plaintiff, a person of color, accommodations in the cabin specially set apart for white persons; and the validity of a statute of the state of Louisiana prohibiting discrimination on account of color, and giving a right of action to the party injured for the violation thereof, was a question for consideration. The steamboat was engaged in interstate commerce, but the plaintiff only sought transportation from one point to another in the state. This court held that statute, so far as applicable to the facts in that case, to be invalid. That decision is invoked here, but there is this marked difference: the supreme court of the state of Louisiana held that the act applied to interstate carriers, and

Hall v. De Cuir.

required them, when they came within the limits of the state, to receive colored passengers into the cabin set apart for white persons. This court, accepting that construction as conclusive, held that the act was a regulation of interstate commerce, and therefore beyond the power of the state. The chief justice, speaking for the court said : " For the purposes of this case, we must treat the act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that state, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as effecting anything else than commerce among the states." And again: " But we think that it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect, in a greater or less degree, those taken up without, and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced." So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce. Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determined by congress alone. In this case, the supreme court of Mississippi held that the statute applied solely to commerce within the state; and that construction,

being the construction of the statute of the state by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the federal constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained. So far as the first section is concerned, and it is with that alone we have to do, its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state.

No question arises under this section as to the power of the state to separate in different compartments interstate passengers, or to affect in any manner the privileges and rights of such passengers. All that we can consider is whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of the powers given to congress by the commerce clause.

In the case of *Wabash, St. L. & P. R. Co. v. Illinois*, *supra*, Mr. Justice MILLER, speaking for the court, said: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate. The reason for that is that both the charge and the actual transportation, in such cases, are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the state which is not subject to the constitutional provision; and the distinction between commerce among the states and the other class of commerce, between the

*Wabash St. L.
& P. R. Co. v.
Illinois.*

citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other. The *Daniel Ball*, 10 Wall. (U. S.) 557; *Hall v. De Cuir*, 95 U. S. 485; *Western Union Tel. Co. v. Texas*, 105 U. S. 460." The statute in this case, as settled by the supreme court of the state of Mississippi, affects only such commerce within the state, and comes, therefore, within the principles thus laid down. It comes, also, within the opinion of this court in the case of *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307. We see no error in the ruling of the supreme court of the state of Mississippi, and its judgment is therefore affirmed.

HARLAN, J., (*dissenting*).—The defendant, the Louisville, New Orleans & Texas Railroad Company, owns and operates a continuous line of railroad from Memphis to New Orleans. If one of its passenger trains—starting for instance, from Memphis to go to New Orleans—enters the territory of Mississippi, without having cars attached to it for the separate accommodation of the white and black races, the company and the conductor of such train is liable to be fined as prescribed in the statute, the validity of which is here in question. In other words, it is made an offense against the state of Mississippi if a railroad company engaged in interstate commerce shall presume to send one of its trains into or through that state without such arrangement of its cars as will secure separate accommodations for both races.

In *Hall v. De Cuir*, 95 U. S. 485, this court declared unconstitutional and void, as a regulation of interstate commerce, an act of the Louisiana legislature which required those engaged in interstate commerce to give all persons travelling in that state, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. The court, speaking by Chief Justice WAITE, said: "We think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier

Regulation of
interstate
commerce.

when engaged within the state, it must necessarily influence his conduct, to some extent, in the management of his business throughout his entire voyage. This disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree, those taken up without, and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more; it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules; and on the other, another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business; and, to secure it, congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

It seems to me that those observations are entirely pertinent to the case before us. In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment forbade the separation of the white and black races while such vessels were within the limits of that state. The Mississippi statute, in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while those trains are within that state. I am unable to perceive how the former is a regulation of interstate commerce, and the other is not. It is difficult to un-

derstand how a state enactment requiring the separation of the white and black races on interstate carriers of passengers is a regulation of commerce among the states, while a similar enactment forbidding such separation is not a regulation of that character.

Without considering other grounds upon which, in my judgment, the statute in question might properly be held to be repugnant to the constitution of the United States, I dissent from the opinion and judgment in this case upon the ground that the statute of Mississippi is, within the decision in *Hall v. De Cuir*, a regulation of commerce among the states, and is therefore void.

I am authorized by Mr. Justice BRADLEY to say that, in his opinion, the statute of Mississippi is void as a regulation of interstate commerce.

Discrimination Against Colored Passengers.—See note 39 Am. & Eng. R. Cas. 404.

RICKETTS

v.

CHESAPEAKE & OHIO R. CO.

(*West Virginia Supreme Court of Appeals, January 29, 1890.*)

Unauthorized Lease—Liability of Lessor for Negligence.—A railroad company chartered by a state cannot, without distinct legislative authority, by lease, or any other contract or arrangement, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road.

Same—Verbal Agreement—Foreign Company—Liability.—Where a railroad company chartered by this state, permits a foreign railroad company to operate a part of its road in this state under a verbal arrangement, and the two railroads form a continuous line through and beyond the limits of this state, the domestic company will be liable for injuries sustained on that portion of its road so operated by the foreign company.

Damages—Measure—Reading of Extracts from Reports.—Upon the trial of an action for damages it is error for the court to permit the counsel for the plaintiff, over the objection of the defendant, in argument, to read to the jury, upon the question of the measure of damages, extracts from reported cases, showing large damages held not excessive.

Exemplary Damages—Wanton and Malicious Injury.—A railroad company cannot be made responsible for exemplary damages on account of injuries done by one of its servants, even though the act was wanton and malicious, unless the act was expressly or impliedly authorized or ratified by the company.

ERROR to Circuit Court, Wayne County.

Simms & Enslow for plaintiff in error.

Vinson & McDonald and *J. S. Marcum* for defendant in error.

SNYDER, P.—Action of trespass on the case, commenced on July 19, 1886, in the circuit court of Wayne County, by G. C. Ricketts against the Chesapeake & Ohio Railway Company, for damages alleged to have been sustained by the plaintiff by reason of an assault committed upon him by an employe of the defendant. There was a demurrer to the declaration, which was overruled, and afterwards a trial by jury on the issue of not guilty, resulting in a verdict and judgment in favor of the plaintiff for the sum of \$5,000. During the trial the defendant excepted to certain actions and rulings of the court, and to review said actions and rulings it has brought this writ of error. Case stated.

All the evidence adduced on the trial is made a part of the record, and the first error complained of is that upon the facts disclosed the defendant is not liable for the alleged injury to the plaintiff, because the wrong, if any, was done by the Elizabethtown, Lexington & Big Sandy Railroad Company, and not by the defendant. The facts in respect to this question are as follows: The defendant is a domestic corporation, passing through this state, and connecting at the Big Sandy river, the state line, with the Elizabethtown, Lexington & Big Sandy Railroad Company, a Kentucky corporation; and by a verbal arrangement between these two companies the Elizabethtown, Lexington & Big Sandy Company operated that part of the defendant's road between the Big Sandy river and Huntington, a distance of about 10 miles, in this state. These two roads, while existing under separate charters, and organizations, were in fact operated as a continuous line of railroad from Newport News, in the state of Virginia, to Lexington, in the state of Kentucky, passing through Richmond, Va., Huntington in this state, and Catlettsburg, in Kentucky. The evidence does not disclose the terms under which that part of the defendant's railroad between Huntington and the state line was operated, or how the expenses were provided for, or what division or disposition was made of the earnings. It does appear, however, that the defendant owns a large part of the rolling stock used on that part of its road; that at least some of the officers and servants in charge of that part of its line were paid by the defendant; and that the Elizabethtown, Lexington & Big Sandy Company had not complied with the provisions of the statutes of this state in such manner as to authorize it to operate a railroad in this state. Facts.

The facts further show that on December 21, 1885, the plaintiff, at Catlettsburg, in Kentucky, purchased of an agent of the Elizabethtown, Lexington & Big Sandy Company a ticket from that place to Huntington; that upon said ticket he took passage upon a train to Huntington, and after passing on the train into this state he was found by the conductor in the ladies' car, smoking a cigar, and then and there a difficulty arose, which resulted in the alleged assault upon and injury to the plaintiff, for which he brought this action.

It seems to me that under this state of facts the defendant was liable to the plaintiff, if he was injured by reason of the misconduct or negligence of the officers or employes on the said train. The court, in its opinion in *York & M. L. R. Co. v. Winans*, 17 How. (U. S.) 38, 39, says: "Important franchises were conferred upon the corporation to enable it to provide the

Unauthorized lease—
Liability of
lessor.

facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." And in *Washington, A. & G. R. Co. v. Brown*, the court says: "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter, or the general laws of the state, by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public." 17 Wall. (U. S.), 450; 1 Redf. R. R. chap. 22, § 1, p. 616. In *Naglee v. Alexandria & F. R. Co.*, 83 Va. 707, 32 Am. & Eng. R. Cas. 401, the court decided that by executing a deed conveying its road, franchises, etc., to trustees selected by itself, a railroad company cannot evade its legal liabilities for injuries subsequently done to persons and property by the negligent operation of its road. We think it may be stated, as the just result of the decided cases, and on sound principle, that a railroad corporation cannot, without distinct legislative authority, by lease, or any other contract, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 309, 24 Am. & Eng. R. Cas. 58; *Grand Tower Mfg. & Transp. Co. v. Ullman*, 89 Ill. 244; *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

In order to understand the next error complained of,

which relates to the instructions to the jury, it is necessary to state that the evidence for the plaintiff tended to prove that the plaintiff was a passenger on the train, and, finding no fire in the smoking-car, he went into the ladies' car, and was there smoking a cigar, but, upon being informed by the conductor that it was a violation of the rules of the company to smoke in that car, he desisted; that soon after a brakeman on the train struck him on the face, knocked him down, and injured him very seriously. The brakeman who assaulted the plaintiff was only acting as brakeman on the passenger train for that trip, his general employment and duties being that of brakeman on freight trains; and it is not shown that he was thereafter allowed to do service on any passenger train. It is proper to state, also, that the evidence of the defendant tended to show that the plaintiff persisted in smoking in the ladies' car after repeated requests to stop it, or go into the smoking car; and that he was the aggressor, and his misconduct the prime cause of the combat which resulted in the injury of which he complains.

While arguing the case to the jury, the plaintiff's counsel was allowed by the court, against the protest and objection of the defendant, to read from the American Reports verdicts in which large damages had been found by juries in cases similar to the one on trial. At the instance of the defendant, the court afterwards instructed the jury "that in case they find for the plaintiff they are not to take into consideration, nor be influenced by, the verdicts of the juries in the cases read to them by the attorney for the plaintiff, in the argument of this case, in fixing the amount of damages the plaintiff is entitled to." The plaintiff in error insists that it was error to permit the counsel for the plaintiff to read the said verdicts to the jury, and that the instruction of the court to disregard them did not cure the error and wrong done thereby. In 1 Thomp. Trials, § 947, the law is stated as follows: "Counsel have no right, in argument, to introduce any evidentiary matters to the jury, which have not been regularly offered and admitted in evidence, in presenting the evidence in support of the action of the defense. * * * Applying these principles, it is held, even in those jurisdictions where counsel are permitted to argue the law to the jury, that they cannot be allowed, under pretense of reading legal authorities to the jury, to read passages from such books which bear upon questions of fact which are before the jury for consideration, thus introducing to the minds of the jurors evidentiary matters which have not been regularly admitted by the presiding judge." *Phoenix Ins. Co. v. Allen*, 11 Mich. 501;

Reading
extracts
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Baldwin's Appeal, 44 Conn. 37. In *City of Evansville v. Wilter*, 86 Ind. 414, which was an action against a city for damages resulting from injuries caused by a defective sidewalk, the court held: "Upon the trial, in such action, it is error to permit counsel for the plaintiff, over objection, in argument to the court in the presence of the jury, upon the question of the measure of damages, to read extracts from reported cases showing 'large damages held not excessive; but such error is cured by a direction of the court to the jury to the effect that the case before them must be determined upon the evidence, uninfluenced by the damages given in other cases.'" It is difficult, if not impossible, to discover how, or in what way, the reading of verdicts in other cases could enlighten the court or the jury upon the principles of law involved in the discussion of the question of damages. It is almost impossible to resist the conclusion that the extracts which the counsel read were not read with a view to enable the court to rightly decide upon the damages, but that the purpose was to reach and influence the jury in the amount of damages they should find in the case on trial. As the reading of such extracts could not enlighten the court as to its duties, and it being clearly improper matter to be read to the jury, it was necessarily error to permit it to be read by counsel; and the court should have sustained the objection of defendant's counsel. It is unnecessary, in this case, to decide whether or not the instruction of the court to disregard said extracts in making up their verdict cured the error, because the judgment here must be reversed for another error. It may be proper to say, however, that as a general rule such error may be cured by such an instruction; but whether it will or not must depend upon the propriety of the verdict, and other facts in the particular case. The safer rule, therefore, seems to be to exclude such matters in the first instance, and not depend upon nullifying their prejudicial effects by an instruction.

From what has preceded, it sufficiently appears that the plaintiff in error was not prejudiced either by the refusal or the giving of any of the instructions, unless there was error in the giving of the following: "The court instructs the jury that if they find the defendant guilty they are, in estimating the damage, at liberty to consider the health and condition of the plaintiff before the injury complained of, as compared with its present condition, in consequence of said injuries, and whether said injury is in its nature permanent; and the reasonable expense incurred by the plaintiff, if any, in curing, or endeavoring to cure, the injuries he received; also, the damages suffered, if

Exemplary
damages.

any, from the loss of time and inability to attend to business, resulting from the injuries received; also, the bodily and mental pain and suffering, if any, resulting from the injuries received, and for the outrage and indignity put upon him, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury for which the plaintiff has sustained;* and that if they believe that this assault was made in a malicious, unlawful, wanton, and unnecessary manner, then they will be warranted in giving the plaintiff exemplary damages." It seems to me that there is no valid objection to all that part of said instruction which precedes the star (*), as above printed; but I am of opinion that the sentence following the star is erroneous. There was no evidence in this case proving, or even tending to prove, that the conduct of the brakeman in assaulting and injuring the plaintiff was either authorized or ratified by the company. In *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732, 743, this court, after referring to the fact that there was some diversity in the decisions, says: "But the better and more reasonable doctrine seems to be, that the railway company is not to be held liable in exemplary damages for injuries caused by the negligence of its servants, unless it be shown that the servant's act was willful, and was either authorized or ratified by the company; but such authorization or ratification can be evidenced either by an express order to do the act, or an express approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant." *Patt. Ry. Acc. Law*, § 392, p. 471. As before stated, the evidence in this case shows that the brakeman who caused the injury complained of was only acting as brakeman on the train for that trip; and there is no evidence even tending to show that his conduct was either authorized or approved, or that he was incompetent, or of known bad character. In the absence of any such authorization or approval of the act of the brakeman, even if it was wanton and malicious, the company cannot be made responsible for exemplary damages. The extent to which it could be held liable would be for compensatory damages, such as are designated in the first part of the instruction. The character of the damages for which the defendant could be made liable having been specifically and fully covered by the first portion of the instruction, it was error to tell the jury, as the concluding sentence of the instruction in effect does, that they might, if they believed the assault was wanton and malicious, then in addition to such damages as were characterized in the first part of the instruction, assess the defendant with exemplary or punitive

damages. *Pegram v. Stortz*, 31 W. Va. 220. For this error the judgment of the circuit court must be reversed, and a new trial directed.

ENGLISH, BRANNON, and LUCAS, JJ., concurred.

Liability of Lessor for Injuries Sustained through Operation of Leased Railroad.—See *East Line & R. R. Co. v. Culberson* (Tex.), 38 Am. & Eng. R. Cas. 225; *Nugent v. Boston, C. & M. R. Co.* (Me.), 38 *Id.* 52; *Ricketts v. Birmingham Street R. Co.* (Ala.), 37 *Id.* 12, note 16; *Chollette v. Omaha & R. V. R. Co.* (Neb.), 37 *Id.* 16.

Recovery of Exemplary Damages for Torts of Servant.—See *Quinn v. South Carolina R. Co.* (S. Car.), 37 Am. & Eng. R. Cas. 166, note 171.

ATCHISON, TOPEKA & SANTA FE R. CO.

v.

COCHRAN.

(*Kansas Supreme Court, February 8, 1890.*)

Negligence—Liability of Stockholder.—A stockholder of a railroad company is not liable for the negligence of the officers, agents, or employees of the company in the operation of its road.

Stock—Power of Connecting Company to Purchase.—Under the laws of Kansas, a railroad company has the lawful right to purchase and hold stock of any other railroad company, the line of whose railroad, constructed or being constructed, connects with its own.

Connecting Railroads—Parent and Auxiliary Companies—Liability for Negligence.—Where the rights and powers of a railroad company are those of a stockholder only, in a connecting railroad, the railroad company, on account of being a stockholder, is not liable for the negligence of the connecting railroad.

Same—Liability—Joint Use of Station—Ticket Agent.—Where two connecting railroad companies use a station jointly, or hire one person to discharge the duties of ticket agent for both, and such person sells a ticket for carriage over one of the roads, the other company is not responsible for the road over which the ticket carries the passenger.

ERROR from District Court, Johnson County.

On the 31st day of May, 1887, Joel Cochran, administrator of the estate of John M. Gibson, deceased, filed his petition in the district court of Johnson county, Kan., against the Atchison, Topeka & Santa Fe Railroad Company, alleging that: "The said plaintiff herein complains of the said defendant herein for that, on the 30th day of May, A. D. 1887, he was duly appointed and qualified, and letters of administration of the estate of John M. Gibson, deceased, were issued to him by the probate court of Johnson county, state of Kansas, as

the administrator of said estate. And the said plaintiff further states that the said defendant herein is now, and was at the date hereinafter first mentioned, a railroad corporation, duly organized under and by virtue of the laws of the state of Kansas, and then owned and operated, and now owns and operates, a railroad known as the Atchison, Topeka & Santa Fe Railroad Company, and as such corporation and railroad company was then, and is now, operating, and exclusively managing and controlling, the Southern Kansas Railroad Company, a corporation duly organized under the laws of the state of Kansas; that the Atchison, Topeka & Santa Fe Railroad Company was then, and still is, a common carrier of passengers for hire upon its trains into and through Douglas and Johnson counties, Kan., and that the said Southern Kansas Railroad Company, so operated, managed, and controlled by the said Atchison, Topeka & Santa Fe Railroad Company, was then, and still is, a common carrier of passengers for hire upon its trains of cars into and through Johnson county, Kan., and then run its trains of cars over and used defendant's tracks from Kansas City, Mo., to Holliday, Kan.; and that the town or village of Holliday was then a regular station and depot in Johnson county, Kan., of the said Atchison, Topeka & Santa Fe Railroad Company, on the main line of its said railroad; and that said town or village of Holliday and the city of Olathe, in Johnson county, Kan., were then regular stations or depots on the line of the Southern Kansas Railroad. Plaintiff further states: On the 21st day of March, A. D. 1887, the plaintiff's intestate, John M. Gibson, had ridden, as a passenger on a regular passenger train of cars of the defendant company, from Lawrence and Eudora, Kan., to said station, Holliday, and that upon said day at Holliday, aforesaid, the said John M. Gibson, now deceased, purchased from said defendant company's ticket agent at Holliday depot, aforesaid, a ticket entitling him to be transported on that day, as a passenger, thence to Olathe, Kan., by and upon a regular passenger train of cars of—and then used by the defendant in the name of—the said Southern Kansas Railroad Company, and that in order for the said John M. Gibson, now deceased, to get upon said regular passenger train of cars, so then being operated, managed, and controlled by said defendant company, to be carried from Holliday to Olathe, aforesaid, it became and was necessary for the said John M. Gibson, now deceased, to walk across the interjacent railroad tracks belonging to said defendant company, and then being used by said defendant company and said Southern Kansas Railroad Company with their locomotive engines and passenger and freight trains of cars—there being

no other way for said decedent to get to and upon said train—and that while the said decedent was in the act of walking across said interjacent railroad tracks, aforesaid, at the station, and upon the invitation of said defendant company, and for the sole purpose of boarding the regular passenger train of cars of the Southern Kansas Railroad Company, as aforesaid, to be carried thence to Olathe, aforesaid, upon said train of cars, which was then at rest, about two or three tracks remote from the platform of the said defendant's depot or ticket office, which said Southern Kansas train of cars did not then come to, nor did it intend to then come to, the platform of said depot, and which train was then about ready to start for Olathe, aforesaid, and there then being no regular crossing across said interjacent tracks, and no person there to warn him of danger, the said defendant company then and there, to-wit, on the 21st day of March, A. D. 1887, at Holliday, aforesaid, carelessly, grossly, negligently, wantonly, and recklessly, by and through its said servants and employes then in charge of, and operating and running, one of its freight trains of cars, with a locomotive engine attached thereto and in motion, on one of said interjacent tracks of said defendant company, permitted the locomotive so attached to said freight train of cars last aforesaid, without any warning of any character to said decedent of danger, to run against, strike, come in contact with, and knock down, and drag in a violent and forcible manner, the said John M. Gibson, now deceased, without any fault, negligence, or want of care on the part of the said decedent, and that by reason of said locomotive engine so striking him, and so knocking him down, and dragging him, the said decedent was greatly bruised, cut, and mangled in and about his head, back, legs, arms, and body, internally, and his right leg was broken, and in consequence thereof the said decedent became sick, sore, and lame, and in consequence of said injuries, so received as aforesaid, he was confined to his bed, and suffered much mental and bodily pain and agony, from the said 21st day of March, A. D. 1887, until on or about the 30th day of March, A. D. 1887, when he died, intestate, at Olathe, Kan., and that said injuries, all and singular, so received by him as aforesaid, were the cause of the death of the said John M. Gibson, without any fault, negligence, or want of care on the part of said decedent contributing thereto. Plaintiff further states that the said John M. Gibson, now deceased, left Mary E. Cochran, *nee* Gibson, and Elizabeth J. Adams, *nee* Gibson, his only children, him surviving, and are his only next of kin him surviving; and that by reason of the premises, all and singular, the said Mary E. Cochran and Elizabeth J. Adams, sole surviving children

and sole next of kin, aforesaid, have been greatly damaged by the death of the said John M. Gibson, now deceased, in and to the amount of ten thousand (\$10,000) dollars, no part of which hath been paid. Plaintiff therefore, as such administrator, demands judgment against the defendant company herein for the sum of ten thousand (\$10,000) dollars, so as aforesaid sustained, with costs of suit and equitable relief."

Trial had at the September term of the court for 1887, before the court with a jury. The court, among other things, charged the jury as follows: "(1) In this case the plaintiff charges the defendant company as being the owner, or operator, controller, and manager of the Southern Kansas Railroad Company, at the time his intestate, Gibson, received his alleged injuries, and therefore I charge you that the question of liability and responsibility of the defendant company is one of fact, to be determined by you from all the testimony in the case. (2) In determining the liability of the defendant company, the true test is, what company had the control, direction, and management of said Southern Kansas Railroad, and of the men then operating the engines and passenger trains on said road, and especially the engine and passenger train on which the plaintiff's intestate was endeavoring to take passage, if any? and in determining these questions it is your duty to take into consideration all the facts and circumstances proven by the evidence. (3) The fact that the officials of one railroad company are officials of another railroad company, standing alone, would not make the one responsible for the negligence or default of the other; neither would the mere fact of the one railroad owning stock or bonds of another railroad company make the former company responsible for the acts of the latter. But if you find from the evidence that the Southern Kansas Railroad Company, for all practical purposes, was, at the time alleged, managed, controlled, and operated by the defendant company, being used as an auxiliary and a part of the defendant company's system of railroads, then and in that event the defendant company would ordinarily be responsible for the negligence, default, or miscarriage of the Southern Kansas Railroad Company, its agents and employes. (4) If in fact the defendant company exercised and assumed the actual control of the management and operation of said Southern Kansas Railroad at the time of the alleged injuries, it would be liable for the negligence, if any, of the men in operating and managing the engines and passenger trains of the Southern Kansas Railroad Company, in failing to bring its passenger trains to the platform of the depot to receive passengers, if they did so fail, even though the men were at the time engaged in the business of another

railroad company, namely, the Southern Kansas Railroad Company. (5) If the jury find that the general management of both roads is under the control of the same officials; that the boards of directors of both roads are substantially the same persons; that a majority of the said stock of said Southern Kansas Railroad Company is owned by the Kansas City, Topeka & Western Railroad Company, which latter company is leased and operated by said defendant company for its use and benefit, and that the balance of the stock of the said Southern Kansas Railroad Company is owned by the defendant company; that both the defendant and the Southern Kansas Company use and occupy the same line of track from Kansas City, Mo., to Holliday, Kan.; that the same person is agent and ticket seller for both companies at said station, Holliday; that the treasurer of said Southern Kansas Railroad Company is also treasurer of the defendant company, and that the clerical work for said treasurer, pertaining to the Southern Kansas Company, is performed by the employes of the defendant company; and that the general officers and offices of both companies are both one and the same,—you have a right to give such facts and circumstances due weight and consideration in arriving at your verdict. * * * (18) If you believe from the evidence that the defendant company was managing and operating and controlling the Southern Kansas Railroad Company on March 21, 1887, and that said defendant company caused the said Southern Kansas Railway Company's passenger train to stop at Holliday to receive passengers, on said day, to be carried for hire to Olathe, and that said defendant company then had a depot building, and a platform therewith connected at Holliday, aforesaid, for the purpose of receiving and discharging passengers to and from its own passenger trains, and for the sale of tickets, and did then sell over said several railroads, then I charge you that it was the lawful duty of the defendant company to provide or furnish reasonably safe and convenient approaches to their several passenger coaches owned and managed, operated and controlled, by said company, and it was the duty of said company to also use such approaches with care and due regard for the safety of passengers who were attempting to get upon such coaches by means of such approaches; and if, upon the said company failing to do so, an injury ensued to such passenger, then the said company will be held liable for injuries resulting therefrom, provided such injured person was not guilty of any fault, or want of ordinary care, or of any negligence contributing thereto. (19) If the jury believe from the evidence that the deceased, on the 21st day of March, 1887, was a passenger on the defendant company's passenger train from Eu-

dora to Holliday, and that on reaching Holliday the deceased immediately purchased a ticket from the defendant company's ticket agent at Holliday entitling the deceased to be carried as a passenger on the Southern Kansas Railroad passenger train from Holliday to Olathe on said day, then managed, operated, and controlled by said defendant company, and that said deceased on said day attempted to reach the Southern Kansas passenger train, bound for Olathe, in the only way provided by the company to reach said train, which was then in waiting on a track at Holliday for passengers to Olathe, then I charge you that the deceased was a passenger at the time, and entitled to all the rights of such. (20) I charge you that a person who has a railroad ticket, and who is present to take the train at the ordinary or usual point of departure designated by the railroad company, is a passenger, though he has not entered the car of the particular train, and in the duties towards him directly involving his safety the company is bound to extraordinary diligence, and in these duties touching his convenience or accommodation the company is bound to ordinary diligence, and this rule of extraordinary diligence applies to the receiving of passengers. (21) When a carrier of passengers for hire by railway does not receive passengers into the car at the platform erected for that purpose, and either directs or impliedly invites passengers to enter the car at an out of the way place, or at a place remote some distance from such platform, it is the bounden duty of such company to use the utmost care in preventing injuries to passengers while so approaching to enter such car; and if you find, in this case, that the defendant company was negligent, within the meaning of this instruction, and that the deceased was injured thereby; that the deceased did not contribute to such injury by his negligence,—then the plaintiff is entitled to recover. * * * (23) When the arrangement of a passenger railroad station or depot, whether permanent or temporary, is such that a passenger has to cross a track before entering, then such passenger has a lawful right to assume that such track may be crossed safely, and that the company will not expose him to unnecessary danger; and, while the passenger himself must exercise reasonable care and prudence, his watchfulness may be naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them with a safe passage to the train of cars."

The jury returned a verdict against the railroad company for \$500, and also found, among others, the following special findings of fact: "(1) Was John M Gibson, now deceased, carried by the defendant company, on one of its passenger

trains, as a passenger, from Eudora, Kan., to Holliday, Kan., on March 21, A. D. 1887? *Answer.* Yes. (2) Did the deceased, on reaching Holliday, purchase a ticket from the defendant's ticket agent at Holliday entitling him to be carried on said day from Holliday to Olathe on a passenger train of the Southern Kansas Railway Company? *A.* Yes. Had the defendant company the control, direction, and management of the Southern Kansas Railroad, and of the men then operating the engines and passenger trains of the Southern Kansas Company, and especially the engine and passenger train upon which the deceased then intended to take passage? *A.* Yes. * * * (6) Was a majority of the stock of said Southern Kansas Railroad Company then owned by the Kansas City, Topeka & Western Railroad Company? *A.* Yes. (7) Was the said Kansas City, Topeka & Western Railroad Company then leased and operated by the Atchison, Topeka & Santa Fe Railroad Company, for its use and benefit? *A.* Yes. (8) Was the balance of the stock of the Southern Kansas Railroad Company then owned by the Atchison, Topeka & Santa Fe Railroad Company? *A.* Yes. * * * (26) Was it negligence on the part of the defendant company, when considered with all the other circumstances, in not bringing the said Southern Kansas train up to the platform so that passengers might get upon it at the time referred to. *A.* Yes. (27) At the time the passengers, including the deceased, left the platform to cross the tracks to get upon said Southern Kansas train, did any person connected with either the defendant company or the Southern Kansas Railroad Company forbid or warn passengers not to cross the tracks? *A.* No. * * * (30) Did the deceased then leave the platform of the depot building, and attempt to cross the track intervening the platform and the Southern Kansas passenger train referred to, for the purpose of getting upon said train to be carried from Holliday to Olathe as a passenger? *A.* Yes. Judgment was entered upon the verdict of the jury. The railroad company excepted, and brings the case here.

George R. Peck, A. A. Hurd, and Robert Dunlap for plaintiff in error.

A. Smith Devenney for defendant in error.

HORTON, C. J.—This was an action brought by Joel Cochran, administrator of John M. Gibson, deceased, against the Atchison, Topeka & Santa Fe Railroad Company, **Facts.** to recover damages for the killing of Mr. Gibson at Holliday, in this state. At the time of his death, Mr. Gibson was a widower with two married daughters, and no other children. He was the owner of a farm in Douglas county,

which was occupied by a tenant. One daughter resided at Eudora, and the other at Olathe. He sometimes made his home with one, and at other times with the other daughter. He was about 65 years of age. About 8 o'clock A. M. on the 21st day of March, 1887, he left Eudora, and took passage on a regular passenger train of the Atchison road for Holliday. The latter is a junction of the Atchison road and the Southern Kansas Railroad in Johnson county. Mr. Gibson left the train at Holliday, and at once purchased a ticket at the office there, over the Southern Kansas Railroad, for Olathe. He was compelled to wait the coming of the Southern Kansas train from Kansas City, Mo., from about 9:30 A. M. until 11:30 A. M. The Southern Kansas train pulled into Holliday, on the second track, about 11:30 A. M.; and at this time there were six or seven passengers for Olathe and the south-west waiting. When the Southern Kansas came up, some of the passengers were on the south side of the platform, next to the first or main track. Among them were Mr. Gibson, the deceased, Johnson, and Owens. Just as the Southern Kansas train had come to a rest, one passenger crossed the first track, and the mail carrier crossed, and got over; and he was followed by Mr. Gibson. As he got upon the track, a freight train of the Atchison road came in from the west, in front of the platform, and on the main track. The engine struck Mr. Gibson, knocked him down, and dragged him some distance between the north rail and the platform. His head was badly cut, his leg was broken in two places, and he was greatly bruised about the body, internally and externally. His daughter, Mrs. Cochran, came to Holliday, took him to her house at Olathe, where he died, intestate, on the 30th day of March, 1887.

It is clearly apparent from the instructions of the court and the findings of the jury that the recovery for the plaintiff below against the railroad company was upon the theory that Mr. Gibson, at the time of his injury, was entitled to the rights and privileges of a passenger of the Atchison Company. This, upon the claim that the Atchison Company controlled, directed, and managed the Southern Kansas Railroad. The testimony in the record will not sustain a verdict upon this ground. The ticket which Gibson purchased at the station read: "Southern Kansas Ry. Co. 1st class ticket. Holliday to Olathe. (When stamped by agent at 1st named station.) S. B. HAYNES, G. P. A. (2882.) [Reversed side stamped:] A., T. & F. R. R. Co. Holliday, Mar. 21st, 1887. Ex. I. A. P. R." At the station of Holliday, the second track south of the depot was used by the Southern Kansas Railway Company for its passenger

Contract of
carriage.

trains, and the main track next to the depot, and south thereof, was used by the Atchison, Topeka & Santa Fe Railroad Company. The jury found that the majority of the stock of the Southern Kansas Railroad Company was owned by the Kansas City, Topeka & Western Railroad Company; that the balance of the stock of the company was owned by the Atchison Company; and that the Atchison Company leased and operated the Kansas City, Topeka & Western Railroad Company. The two companies, according to the testimony, are separate and independent corporations. The Atchison Company, by virtue of controlling the stock of the Southern Kansas Railway Company, was enabled to elect directors of that company. These directors elected several persons who were also officials of the Atchison Company.

In *Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan. 209, 210, 25 Am. & Eng. R. Cas. 305, it is said: "That corporation

*Atchison, T. &
S. F. R. Co. v.
Davis.*

had the power to purchase and hold the stock and bonds of the Wichita & Western Railroad Company, or to guaranty the payment of the principal and interest of the bonds of that company, and thereby, as a stockholder or bondholder, or as a guarantor of the bonds, to aid that company to construct its road; but, by so doing, the Santa Fe Company did not make the Wichita & Western Company its servant or agent, and did not thereby make itself responsible for the negligence or other default of the Wichita & Western Company. Laws 1873, chap. 105; Const. Kan. art. 12, § 2; Comp. Laws 1879, chap. 23, § 32. * * * Where a parent company, operating a long line of road in the state, takes the necessary steps to construct an auxiliary railroad for the purpose of a local line in the name of another company, and, in strictly pursuing the provisions of the statute, merely furnishes aid as a stockholder or bondholder, or a guarantor of bonds, to the auxiliary company, and such auxiliary company constructs its road in its own name, it is not the servant or agent, in such construction of its road, of the parent company; and the parent company is not, on account of being a stockholder or bondholder, or guarantor of bonds, of the auxiliary company, responsible for the negligence or other default of the auxiliary company in constructing its road in its own name."

In the case of *Pullman Pal. Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 23 Am. & Eng. R. Cas. 537, the former company claimed that the St. Louis, Iron Mountain & Southern Railway Company was controlled by the Missouri Pacific Company, and therefore that the Missouri Pacific Company was bound, under its contract, to haul the palace cars over it. In that case, as in this, it was shown that the Missouri Pacific Com-

*Pullman Pal.
Car Co. v.
Missouri Pac.
R. Co.*

pany owned stock in the railroad company, and in that way selected its directors. The court, however, decided that this did not give it the control of the road. Chief Justice WAITE, in delivering the opinion of the court, said, among other things, that "the Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors; but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically, it may control the company; but the company alone controls its road. In a sense, the stockholders of a corporation own its property; but they are not the managers of its business, or in the immediate control of its affairs. Ordinarily, they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain & Southern to control the election of directors; and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business, or the control of the corporate property."

There is no testimony in the record tending to show that the Atchison road leased the Southern Kansas road, or that it was the owner of the road. The rights and powers of the Atchison road were those of a stockholder only. Therefore the Atchison road was not the Southern Kansas corporation, in the sense of that term as applied to the management of the corporate business, or the control of the corporate property, of the Southern Kansas.

Under the laws of this state, a railroad company has a lawful right to purchase and hold stock of any other railroad company, the line of whose railroad, constructed or being constructed, connects with its own. *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 24 Am. & Eng. R. Cas. 34.

Power to purchase stock.

The stockholders of a railroad company may be said, in a certain sense, to control, direct, and manage the road; but an action for the negligence of the officers, agents or employes of the railroad company must be brought against the

company, not against the stockholders. Therefore, as the rights and powers of the Atchison road in the Southern Kansas Railroad Company were those of a stockholder only, the Atchison Company is not responsible for the wrongful acts of omission or commission of the Southern Kansas road. As the rights and powers of the Atchison road in the Southern Kansas were those of a stockholder only, the instruction of the court that the jury might find from the testimony that the Southern Kansas Railroad company, for all practical purposes, was managed, controlled, and operated by the Atchison Company, was misleading. The finding of a verdict upon this and similar instructions cannot be sustained.

The fact that Mr. Gibson purchased a ticket to ride over the Southern Kansas road at the station of the Atchison road at Holliday did not make him a passenger of the Atchison road, or make the Atchison road responsible for the negligence of the Southern Kansas road. The jury found that the person in charge of the ticket office at the station of Holliday was agent both for the Atchison Company and the Southern Kansas Company; but even if the ticket agent at Holliday acted for the Atchison road, and the Atchison road sold the ticket for the Southern Kansas road, this would not make the Atchison road liable for the negligence of the Southern Kansas. The ticket purchased by Mr. Gibson shows that the contract of carriage was made on behalf of the Southern Kansas Railway Company.

Upon a retrial, unless different testimony is presented, the case should not go to the jury upon the theory that the Atchison Company controlled, directed, and managed the Southern Kansas Railroad. If the Southern Kansas road was guilty of negligence in not running its passenger trains close or near to the station, that company is responsible, not the Atchison. If the Atchison road operated its freight train negligently, and, without any contributory negligence on his part, Mr. Gibson was killed thereby, then the Atchison Company is liable, not the Southern Kansas. They were two separate corporations, and the one is not responsible for the negligence of the other. The judgment of the district court will be reversed, and the cause remanded; all the justices concurring.

Parent and Auxiliary Companies—Liability for Negligence.—See *Kankakee & S. R. Co. v. Horan*, *ante*, p. 13; *Atchison, T. & S. F. R. Co. v. Davis*, (Kan.) 25 Am. & Eng. R. Cas. 305, note, 312.

BUCHANAN

v.

WEST JERSEY R. CO.

(New Jersey Supreme Court, February 20, 1890.)

Passenger—Station—Injuries Caused by Fright.—A woman, being obliged to throw herself on a railroad platform to escape being struck by a piece of timber projecting from a car in motion, had her health impaired by the fright thus occasioned. *Held*, she was entitled to recover damages for such impairment of her health.

ON motion for new trial.

The plaintiff, who is a woman, was lawfully on the railroad platform of the defendant. A piece of timber projected from one of the cars of a train so as to sweep over such platform, and the plaintiff, in order to avoid being struck by the projecting timber, was obliged to throw herself on the platform. She did so, and the timber passed over without touching her. By reason of the shock to her nervous system occasioned by this peril, her health was seriously impaired. The verdict was in her favor. Motion for a new trial.

J. W. Westcott for plaintiff.

Peter L. Voorhees for defendant.

BEASLEY, C. J.—This rule should be discharged. The suit was not on the single ground that the plaintiff had been frightened. There was a basis for the action in the carelessness of the company, which compelled the plaintiff to throw herself upon the platform; as such carelessness, leading to that result, was *per se* actionable. The fright was an incident to such cause of action, and a mere aggravation of the tort. It is not necessary in this case to decide whether mere fright, caused by a wrongful accident which results in physical injury—as, for example, sickness—is or is not actionable. Let the rule be discharged.

Peril and Fright Attending Accident as Elements of Damage.—See *Stutz v. Chicago & N. W. R. Co.*, (Wis.) 37 Am. & Eng. R. Cas. 187, and note, 193.

CHICAGO, BURLINGTON & QUINCY R. Co.

v.

MEHLSACK.

(*Illinois Supreme Court, November 26, 1889.*)

Personal Injuries—Passenger—Trespasser—Province of Jury.—Where a person sues a common carrier for damages for personal injuries received while travelling upon a train, and the evidence is conflicting as to whether the plaintiff, who was travelling upon the front platform of a baggage car, was a passenger or a trespasser, an instruction that the plaintiff is entitled to recover if he, while in the exercise of ordinary care, was injured by the negligence of the defendant, withdraws from the jury the question whether the plaintiff was a passenger, and is erroneous.

APPEAL from Appellate Court, First District.

Geo. Willard for appellant.

Joseph S. Kennard, Jr., (Brandt & Hoffmann, of counsel,) for appellee.

BAILEY, J.—This was an action on the case brought by Frank Mehlsack against the Chicago, Burlington & Quincy Railroad Company, to recover damages for a personal injury.

Facts. The injury complained of was sustained by the plaintiff while riding on the platform steps of one of the cars belonging to one of the defendant's passenger trains, which at the time was running from Meagher street to the Union passenger depot, in the city of Chicago. Said train was composed of a locomotive engine and eight cars, to wit, a mail car, which was next to the engine, three baggage cars, which came next, and four passenger coaches in the rear. Said train was a through passenger train from the west, the plaintiff having got aboard as the train stopped at Meagher street. The evidence tends to show that the place on the train where he was riding at the time he was injured was on the steps of the front platform of the forward baggage car; and that said steps, by coming in contact with some obstruction on the ground near the track, were broken off, and that the plaintiff was thereby thrown to the ground and injured in such manner as to necessitate the amputation of one of his legs about six inches below the knee. The evidence shows that he had purchased no ticket, and that he paid no fare, although he claims to have had in his possession sufficient money to pay the customary fare, if he had been called upon to do so, and that he was ready and willing to make such payment.

The declaration consists of five counts. The first, second, and fourth counts allege, in terms, that the plaintiff became a passenger upon said train, and that the defendant negligently failed to carry him safely, whereby he was injured. The third count alleges that the defendant was a common carrier of passengers, and that it was its duty to furnish a sufficient number of cars for such persons as might lawfully desire to enter its trains, and to carry said persons therein with safety, but that it did not furnish a sufficient number of cars, so that the plaintiff was unable to obtain a seat therein, or to enter the car from the platform where he stood; and that by means of said default, and the careless management of said train, an obstruction on the railroad struck and carried away a part of said platform, whereby the plaintiff was thrown to the ground and injured. The fifth count alleges that the defendant was a common carrier of passengers, and that it was its duty to remove from its track and right of way any and all obstructions which might or could endanger the safety of persons lawfully riding upon its trains, yet the defendant negligently allowed certain obstructions to accumulate upon its right of way, and in close proximity to its track, whereby said train came into collision with said obstructions, and thereby the part of the train upon which the plaintiff was standing was broken off, and the plaintiff thrown to the ground and injured. A trial was had on the plea of not guilty, and at said trial the jury found the defendant guilty, and assessed the plaintiff's damages at \$6,000; and for that sum and costs the plaintiff had judgment. On appeal to the appellate court said judgment was affirmed, and the case is brought here on appeal from the judgment of the appellate court.

The main controversy at the trial was as to whether the plaintiff, at the time he was injured, was a passenger on said train, or a mere trespasser, seeking to obtain a ride without the knowledge or consent of the defendant, or its employes in charge of the train, and without paying the customary fare; and upon this question the evidence was conflicting. The court thereupon gave to the jury, at the instance of the plaintiff, the following instruction: "If the jury believe from the evidence that the plaintiff, while in the exercise of ordinary care, and without negligence on his part, was injured by negligence of the defendant, as alleged in the declaration, then the jury should find the defendant guilty, and assess the plaintiff's damages." This instruction is clearly erroneous, for the reason that it wholly omits the hypothesis that the plaintiff, at the time of his injury, was a passenger on the

Declaration.

Who are passengers—
Province of jury.

defendant's train. The plaintiff, in his declaration, proceeds entirely upon the theory that the legal relation of carrier and passenger had been established between the defendant and him. In three counts of the declaration that relation is expressly averred, and the negligence charged is a failure to perform the duties and exercise the diligence which that relation imposed. In each of the other counts the defendant is declared against as a common carrier of passengers; and, although in those counts there is no express averment that the plaintiff had become a passenger, yet the duties which are alleged to have been neglected are those which a carrier owes to its passengers, and which it does not owe to a mere trespasser. A common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, and especially to trespassers, that it is in guarding against injuries to passengers. His duty to the latter involves the use of the utmost care and diligence which can be bestowed by human skill and foresight, and is enforced by the highest considerations of public policy. But as to the former, his duty rests merely upon grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons, whether such persons are on or off the vehicle. *Schouler, Bailm. § 620.* In *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, we held that a person fraudulently riding on a free pass issued to another, and not transferable, was not a passenger, and that the railroad company would only be held liable for gross negligence which would amount to willful injury. The above-mentioned instruction required a verdict of guilty upon mere proof that the injury complained of was caused by the negligence alleged in the declaration, irrespective of whether the plaintiff was a passenger or a mere trespasser, although the negligence alleged was such as would render a carrier liable only in case of injury to a passenger. This, in effect, took from the jury all consideration of the questions presented by the evidence, which tended to show that the plaintiff, at the time of his injury, was attempting to obtain a free ride without the consent of the defendant or its agents. If such was the fact, the defendant can be held liable only for the consequences of gross negligence amounting to willful or wanton misconduct; and such is not the negligence charged in the declaration.

A number of other instructions were given; but none of them, in our opinion, can have the effect of curing the error above pointed out. For said error the judgment of the appellate and superior courts must be reversed, and the cause will be remanded to the latter court for a new trial.

When the Relation of Passenger and Carrier Exists—"Passenger" Defined.—A passenger, in the legal sense of the term, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier as to the payment of fare or that which is accepted as an equivalent for fare. *Pennsylvania R. Co. v. Price* (Pa.), 1 Am. & Eng. R. Cas. 234.

Same—Presumption Arising from Presence of Traveller.—Every person travelling in a railroad car or other public conveyance and not connected with the railroad company or carrier, is presumed to be there lawfully as a passenger, and the *onus* is on the carrier to prove that he is a trespasser. *Louisville, N. A. & C. R. Co. v. Thompson* (Ind.), 27 Am. & Eng. R. Cas. 329; *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339. And it has been held that the possession of a baggage check and the testimony of the baggage master, that when required by a passenger he puts a check on his baggage and gives a duplicate to him, is sufficient evidence that the person possessing the check was a passenger on the car, and that he had baggage checked on that occasion. *Davis v. Cayuga & S. R. Co.*, 10 How. Pr. (N. Y.), 330. But when a steamboat stops at one of its usual stopping places for taking on passengers and freight, it is not a presumption of law that every person who goes on board does so as a passenger, unless he notifies an officer to the contrary so as to relieve the officer from giving to such as do not come aboard as passengers, proper time and facilities for getting ashore. *Keokuk Packet Co. v. Henry*, 50 Ill. 364.

Same—Assent of Carrier—Illegal and Invalid Contracts.—If a person enters the cars of a railroad company with the assent, express or implied, of the company, it owes him the duty of exercising care for his safety, and is responsible for an injury caused by its negligence; *Bissell v. Michigan S. R. Co.*, 22 N. Y. 258, 307; and it would appear that the company owes a similar duty to a person whom it is bound to carry pursuant to an obligation imposed by statute. *Collett v. London & N. W. R. Co.*, 16 Q. B. 984. Accordingly, although the contract upon which a person is travelling is void upon grounds of public policy, or as *ultra vires* of the company, he must still be deemed to have entered the company's cars by its express consent and he is not a trespasser, but the company owes him the duty of exercising due care for his safety; *Bissell v. Michigan S. R. Co.*, 22 N. Y. 258, 308; and it has been held that the obligation of the common carrier to exercise the highest degree of care for the safety of passengers is not affected by the fact that the act of the passenger in travelling upon the cars is in violation of the Sunday laws. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221. But the decisions of the various courts are not uniform upon this point. See note, 16 Am. & Eng. R. Cas. 334. When, by law, railroad companies are prohibited from issuing free passes, a person who travels upon a pass unlawfully issued to him, does not thereby become a trespasser. If the free pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the traveller a trespasser, or destroy his rights as a passenger. *Buffalo, P. & W. R. Co. v. O'Hara* (Pa.), 9 Am. & Eng. R. Cas. 317.

Same—Purchase of Ticket and Payment of Fare.—The purchase of a ticket by a person entitling him to travel between two stations creates the relation of carrier and passenger with all the duties imposed by law against each; *Wabash, St. L. & P. R. Co. v. Rector* (Ill.), 9 Am. & Eng. R. Cas. 264; and the payment and receipt of fare constitute unequivocal evidence of the existence of the relation. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221. But a contract is implied that if a person takes passage with a common carrier he shall pay for being carried, and that he shall be carried safely, and an express contract need not be proved. *Frink v. Schroyer*, 18 Ill. 416.

To bring the relation into existence, it is not necessary that the ticket entitling the person to travel should have been purchased from the carrier himself. Thus, where a benefit society hired a train for an excursion, and the tickets were sold by the treasurer of the society from whom plaintiff purchased one, it was held that there was evidence for the jury that the plaintiff was a passenger. *Skinner v. London, B. & S. C. R. Co.*, 5 Exch. 787.

The actual purchase of a ticket before entering a car is not always necessary to constitute the relation of carrier and passenger. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264. Nor is it necessary that the traveller should have paid his fare. *Ohio & M. R. Co. v. Muhling*, 30 Ill. 1; *Rose v. Des Moines Val. R. Co.*, 39 Iowa 246; *Hurt v. Southern R. Co.*, 40 Miss. 391; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168, 171; *Gordon v. Grand St. & N. R. Co.*, 40 Barb. (N. Y.) 546; *Nashville & C. R. Co. v. Messina*, 1 Sneed (Tenn.), 220. Any traveller who enters a conveyance in good faith to take passage thereon, is a passenger. *Union Pac. R. Co. v. Nichols*, 8 Kan. 505, 517; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168, 171; *Nashville & C. R. Co. v. Messina*, 1 Sneed (Tenn.), 220. But if a person has entered a car and is allowed to remain upon it after refusal to pay his fare because of threats to resist removal by force, he cannot be deemed a passenger, and the company owes him no personal duty. *Gilmer v. Higley*, 110 U. S. 47; 3 Mont. 90. If, however, the refusal to pay fare is justifiable, the traveller does not forfeit his rights as a passenger. Thus, where a person entered a car which started before he had an opportunity to leave it, and the conductor failed or refused to provide him with a seat as required by law, his refusal to pay fare was justifiable, and he did not forfeit any of the rights of a passenger. *Hardenbergh v. St Paul, M. & M. R. Co. (Minn.)*, 34 Am. & Eng. R. Cas. 359.

Same—Persons in Waiting Room.—An entry into a car is not essential to create the relation of carrier and passenger. A person waiting in a waiting-room to take a car, is a passenger; *Gordon v. Grand St. & N. R. Co.*, 40 Barb. (N. Y.), 546; and where a woman while waiting for a train, left the waiting-room which was being cleaned, and by the direction of the station agent entered a vacant car standing by the station platform, it was held that such person was a passenger while in the car. *Shannon v. Boston & A. R. Co. (Me.)*, 23 Am. & Eng. R. Cas. 511. But a person who enters a railway station intending to take a certain train, and, finding it gone, waits in the station for a horse car is not a passenger, and the company is not under the duty as to him of keeping its premises safely lighted. *Heinlein v. Boston & P. R. Co. (Mass.)*, 33 Am. & Eng. R. Cas. 500.

Same—Persons at Depot to Take Train.—A person who has purchased a railroad ticket and is present at the ordinary point of departure to take a train, is a passenger though he has not entered the cars; *Central R. & B. Co. v. Perry*, 58 Ga. 461; *Carpenter v. Boston & A. R. Co. (N. Y.)*, 21 Am. & Eng. R. Cas. 331; and a person is to be considered a passenger while going from the ticket office to take his seat on the car; *Warren v. Fitchburg R. Co.*, 8 Allen (Mass), 227. Where plaintiff entered the office or waiting-room at a depot and informed the depot agent of her desire to become a passenger and he directed her as to the manner in which she should get upon a caboose car, there is sufficient evidence to justify a finding that the relation of carrier and passenger existed. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264.

But in *Indiana C. R. Co. v. Hudelson*, 13 Ind. 325, a contrary view seems to have been adopted, and it was held that where plaintiff without having procured a ticket was crossing the sidetrack of a railroad to get upon a passenger train at its usual place of stopping on the main track, but by the

negligence of the employes of the company a switch had been left open, and the train was thrown in upon the side track and plaintiff run over, that he was not a passenger at the time of the injury, and that his right to cross the sidewalk was only the right that persons have to cross a railroad upon a public street or highway.

Where by the contract contained in a drover's pass, it was stipulated that its acceptance should be considered "a waiver of all claims against the company for personal injury when received on the above train," and the plaintiff was injured before entering the train, but after it had been formed and was about to start, it was held that plaintiff was a passenger and bound by the stipulation although not actually upon the train. *Poucher v. New York C. R. Co.*, 46 N. Y. 263, 10 Am. Rep. 364.

Same—Persons Hailing Street Car, etc.—If a person has hailed a street car or omnibus, and it has stopped for the purpose of enabling him to enter, the stopping implies a consent to accept such person as a passenger, and the carrier is liable for injuries to him whilst attempting to get upon it. *Smith v. St. Paul City R. Co.* (Minn.), 16 Am. & Eng. R. Cas. 310; *Brien v. Bennett*, 8 C. & P. 724. See also *McDonough v. Metropolitan R. Co.*, 137 Mass. 210.

Same—Persons Entering Car.—When a passenger has been invited to enter a car, or enters it in obedience to the announcement that it is ready to receive passengers, the relation of carrier and passenger is created; *Hannibal & St. J. R. Co. v. Martin*, 11 Ill. App. 386; and if a railroad company permits passengers to take trains at a place which is not a depot, a person taking a train at such place is not a trespasser, and when he has reached in safety the inside of a passenger car, he then, if not before, becomes a passenger. *Dewire v. Boston & M. R. Co.* (Mass.), 37 Am. & Eng. R. Cas. 57. But a person who goes upon a railroad train after it has started, does not become a passenger until he reaches a place of safety inside the car. *Merrill v. Eastern R. Co.*, 139 Mass. 238.

Defendant, a railroad company, made a contract with one Downs, to run a stage coach for a daily compensation, between a station on its line and a village a mile distant. Downs was furnished with railroad tickets which he sold from the station to various places on the railroad, generally at the station, sometimes on the coach. Plaintiff took the coach for the station, for the purpose of travelling upon a train, but was injured before reaching the station. Held, that he was a passenger, and that the defendant was liable. *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168, aff'g 36 Barb. (N. Y.), 420.

A person who is injured while walking from a connecting steamboat to a railway by the customary route, is injured while travelling by public conveyance within the meaning of a policy which insures against personal injuries when caused by any accident while travelling "by any public or private conveyance provided for the transportation of passengers." *Northrup v. Railway Passenger Assur. Co.*, 43 N. Y. 516, rev'g 2 Lans. (N. Y.), 166.

Same—Persons Leaving Cars.—Travellers are, whilst in the act of leaving a railroad car, deemed to be passengers. Thus, where a policy was issued insuring against railway accident while travelling in any carriage or any line of railway in Great Britain, it was held that it covered an injury received from slipping on the step of the car while standing at the station in getting out. *Theobald v. Railway Passenger Assur. Co.*, 10 Exch. 44. And if a railroad company which is obliged by law to stop its train at a certain place before crossing another track, has constructed a platform and erected a building upon one side of its track, and has been accustomed to receive passengers there and to permit them to alight, it owes a person who alights there on the wrong side of the train by reason of defendant's neglect to take precautions to prevent his doing so, the duties which a carrier owes a passenger. *McKimble v. Boston & M. R. Co.* (Mass.), 24

Am. & Eng. R. Cas. 463. But a person who leaves a train whilst it is in motion at a place and time when and where the corporation could not anticipate that he would leave it ceases to be a passenger, and the company owes him no duty to see that he is not injured thereafter. *Com. v. Boston & M. R. Co.* (Mass.), 1 *Am. & Eng. R. Cas.* 457. And a passenger who had reached his destination, had alighted from the train, had taken a position upon the sidewalk of the highway, had started across the track but not upon his way to the station, and was injured while so crossing, was held to have ceased to be a passenger before the accident. *Allerton v. Boston & M. R. Co.* (Mass.), 34 *Am. & Eng. R. Cas.* 563.

Plaintiff, a passenger on a street car, left it by the front platform after it had been stopped. When 6 or 8 feet from the car in the street, she was thrown down and injured by the car horses which had been detached from the car and were turned round. Held that when plaintiff was injured, she was no longer a passenger on defendant's car. *Platt v. Forty-Second St. & G. St. F. R. Co.*, 4 *Thomp. & C.* (N. Y.), 406; 2 *Hun* (N. Y.), 124.

Plaintiff, a passenger on a railroad train, tendered in payment of the usual fare of five cents, a five dollar bill. The conductor told him that he was unable to change it, but that he would get it changed at the depot. Plaintiff allowed the conductor to retain the bill. On the arrival of the train at the depot, plaintiff alighted and waited in the depot expecting the conductor to return him the change. He waited some 20 or 30 minutes, when seeing that the train was about to start, he jumped aboard it and asked for his change. The conductor handed him back the bill and told him to get off the train as quick as he could. Plaintiff jumped from the train whilst it was in motion and was injured. Held, that when plaintiff got upon the train after it had moved from the station for the exclusive purpose of getting from the conductor the money due him, and when he jumped off at a point beyond not suitable for, nor intended for passengers to alight, the relation of carrier and passenger did not exist between him and the railroad company. *Pittsburg, C. & St. L. R. Co. v. Krouse*, 30 *Ohio St.* 222.

Same—Persons Leaving Cars at Intermediate Stations.—A passenger on a boat still remains a passenger while he is leaving it temporarily at a place where the boat is to remain for a period of about two hours. *Keokuk Northern Line Packet Co. v. True*, 88 *Ill.* 608. See also *Dodge v. Boston & B. S. S. Co.*, 37 *Am. & Eng. R. Cas.* 67. And a passenger on a train has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for refreshment and in a street alongside the platform, and the servants of the company are bound to exercise the care of reasonable and prudent men in the discharge of their duties on such platforms and streets. *Jeffersonville, M. & I. R. Co. v. Riley*, 39 *Ind.* 568.

Same—Transportation Obtained by Fraud.—If a person stealthily and without the knowledge of the company's employees, secretes himself upon a train, or if he induces the conductor to violate a rule of the company and carry him without charge, he is guilty of a fraud upon the company and cannot claim the rights of a passenger. *Toledo, W. & W. R. Co. v. Brooks*, 81 *Ill.* 245. So too, where a person travels upon a free pass issued to another, and not transferable, and passes himself as the person named in the pass, he is not a passenger. *Toledo, W. & W. R. Co. v. Beggs*, 85 *Ill.* 80.

If a ticket is procured by fraud, the fraud will vitiate the contract, and the person using it will not be entitled to the rights of a passenger. Thus, where a shipper of stock in order to obtain a pass, represented that his wife was owner of part of the stock, the right to a pass being limited to such persons, it was held that the contract of carriage was vitiated by the fraud. *Brown v. Missouri, K. & T. R. Co.*, 64 *Mo.* 536.

Plaintiff desired to procure the transportation of a horse by defendant's railroad, and applied to A. who had several horses to go by the same train, to take his with them and have them billed together in A's name. This was done. A printed rule of the company provided that only one person should go free with stock, and on A. stating to defendant's agent that there might be another man to go with them, the latter replied that he would have to pay fare. A. did not mention the plaintiff's name, and the company had no other knowledge of his intention to go by the train. He assisted A. to get the horses on board and intended to get a ticket but had not time, and expected to pay his fare when called upon by the conductor. The train was a freight train. Plaintiff travelled in the same car as the horses. On the passage, and before plaintiff had paid any fare, the train was run into by another through the negligence of the defendant and the plaintiff injured. *Held*, that as the train was a freight train without any passenger car attached and the plaintiff was travelling in a place where passengers would not be likely to travel unless the safety of their stock required it, or unless their intention was to secure a free ride, and no invitation to the plaintiff or to the public to take passage upon the train was extended, plaintiff was not a passenger, and that the intention of the plaintiff to pay his fare and his good faith in the matter were immaterial. *Gardner v. New Haven & N. R. Co. (Conn.)*, 18 Am. & Eng. R. Cas. 170.

But if the traveller is in good faith using a pass or ticket which he believes to be available, or if his right to travel upon it is recognized, the duty which the carrier owes him is that which a carrier owes a passenger. Accordingly, where a person was induced to believe by the conduct and language of the carrier's employes that he had a contract for a round trip, it was held that he was a passenger. *Russ v. The War Eagle*, 14 Iowa, 363. And where a person in good faith presented a commutation ticket which was issued to another and was not transferable, and his claim to be carried was recognized, it was held that he was entitled to the rights of a passenger. *Robostelli v. New York, N. H. & H. R. Co. (C. C.)*, 34 Am. & Eng. R. Cas. 515.

Defendant had issued a free pass not transferable to a newspaper reporter, and on the ticket was a memoranda to the effect that any person other than the person named in the pass should be subject to a penalty for using the pass, or that he should be liable to pay fare. Plaintiff while travelling on the business of the journal, was entitled by usage to a privilege of this nature, but took a ticket in which another reporter of the same journal was named. On several occasions before, he had made use of such tickets with the knowledge of some of defendant's officers and employes. The reporter received an injury, for which he brought suit. *Held*, that it was for the jury to say whether he was lawfully on the train. If the use of the ticket was unauthorized and the plaintiff thereby became liable for increased fare, he could not be considered as a trespasser. *Great Northern R. Co. v. Harrison*, 10 Exch. 376.

By statute, railway companies were bound to carry by certain trains children under three years of age without charge, and entitled to half fare for children between three and twelve years of age. Plaintiff's mother carrying in her arms the plaintiff, a child of three years and three months, took a ticket for herself by one of these trains, but did not take a ticket for plaintiff. In the course of the journey an accident occurred through the negligence of the defendants, and plaintiff was injured. At the time plaintiff's mother took her ticket, no question was asked by defendant's servants as to the age of the child, and there was no intention on the part of the mother to defraud the company. *Held*, that plaintiff was entitled to recover for the injuries he received. *Austin v. Great Western R. Co.*, L. R., 2 Q. B. 442.

Same—Persons Entering Wrong Train.—A person who by mistake goes upon a passenger train other than the one he intended to take passage upon, is, nevertheless, a passenger upon the train he is on. *Columbus, C. & I. R. Co. v. Powell*, 40 Ind. 37; *Cincinnati, H. & I. R. Co. v. Carper* (Ind.), 31 Am. & Eng. R. Cas. 36; *Arnold v. Pennsylvania R. Co.* (Pa.), 28 *Id.* 189.

When a passenger purchases a railroad ticket, no irrebutable presumption arises that he is informed as to the rules and regulations of the company prohibiting the use of such tickets on certain trains, when no such prohibition appears on its face. If, in such case, the passenger without knowledge of such regulation, takes passage upon a prohibited train, he cannot be treated as a trespasser, and although he has no right to passage cannot be expelled from the train as a trespasser, but must be treated as a passenger who by mistake has got upon a train on which, by his contract, he is not entitled to travel. *Lake Shore & M. S. R. Co. v. Rosenzweig* (Pa.), 26 Am. & Eng. R. Cas. 489.

But where a person who has purchased a railroad ticket for a designated station without making any inquiries or ascertaining what trains stop at the station to which he desires to go, subsequently takes his seat in a train which does not stop at the station for which he has a ticket, and such person refuses to pay his fare on the demand of the conductor to the next station at which the train is to stop, and also refuses to leave the train when requested to do so by the conductor after he has stopped it at a suitable place for that purpose, such person is a trespasser. *Atchison, T. & S. F. R. Co. v. Gantz* (Kan.), 34 Am. & Eng. R. Cas. 290.

Same—Permission of Employees to Travel on Train.—Although, by the rules of a railroad company, conductors are prohibited from carrying passengers on construction or freight trains, yet, if a conductor is in the habit of carrying persons on such a train, and a person, in ignorance of the company's rules, obtains permission so to travel, he is lawfully upon the train and the company owes him the exercise of reasonable care and diligence: *St. Joseph & W. R. Co. v. Wheeler* (Kan.), 26 Am. & Eng. R. Cas. 173; *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41; and where a person was lawfully in a cab of a freight train pleading for passage as had frequently been done by other persons, it was held that he stood in the same relation as a passenger so far as concerned injuries wantonly and maliciously inflicted upon him by the conductor. *Western & A. R. Co. v. Turner* (Ga.), 28 Am. & Eng. R. Cas. 455. But if the liability of the company depends upon the question whether the train was one upon which it was customary to carry passengers, the fact that the conductor had permitted persons to travel upon it on two or three occasions and had collected fare, is not sufficient. The proof should show that the train carried passengers habitually or frequently. *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41. The fact that a freight train was not brought to the platform, or that the caboose was not convenient for passengers, or that the ticket office, to the knowledge of a person taking passage upon such train, was not open at or about the time of its departure, is not notice that the train was not one which was accustomed to carry passengers, when it appears that the ticket office was only opened for the sale of tickets at or about the time of the departure of regular passenger trains, and there was nothing in the external appearance of a caboose to indicate that it was not adapted for passenger traffic. *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41. Where a drover claimed that it was the custom for persons in charge of cattle to travel on an engine by the consent of the engineer, and the company claimed that it was contrary to orders for any person to ride on an engine, the question whether the company had, notwithstanding its rules, by its conduct held out its employes as authorized to consent to drovers being upon the engine, is for the jury. *Waterbury v. New York C. & H. R. R. Co.* 17 Fed.

Rep. 671. See, also, *Lake Shore & M. S. R. Co. v. Brown* (Ill.), 31 Am. & Eng. R. Cas. 61.

When a person is riding in a place not adapted for passengers by the invitation of the person in charge of the car, he is not a trespasser, and the company is responsible to him for injuries sustained through its employees' negligence: *Wilton v. Middlesex R. Co.*, 107 Mass. 108, 125 Mass. 130; and if a person entitled to transportation is requested by those in charge of a switch engine to get upon the engine for the purpose of being conveyed to his destination, the employees in charge of the engine are bound to exercise such care for his safety as is required in the case of a passenger, and the question whether he was a passenger, is one of fact for the jury. *Lake Shore & M. S. R. Co. v. Brown* (Ill.), 31 Am. & Eng. R. Cas. 61.

But if a person wrongfully gets upon an engine without the consent of any officer or agent and in violation of the company's rules of which he has knowledge, and his purpose is to evade the payment of fare, the relation of carrier and passenger does not come into existence. *Chicago & A. R. Co. v. Michie*, 83 Ill. 427. If, however, a person has boarded a train without the knowledge of the conductor, he is to be regarded as a passenger, if the conductor after becoming aware of his presence, permits him to remain, although passengers are not allowed to be carried on the train, and he has paid, and intends to pay no fare. *Brennan v. Fair Haven & W. R. Co.*, 45 Conn. 284; *Muhlhausen v. St. Louis R. Co. (Mo.)*, 28 Am. & Eng. R. Cas. 157; *Sherman v. Hannibal & St. J. R. Co. (Mo.)*, 4 *Id.* 589; *Secord v. St. Paul, M. & M. R. Co.*, 18 Fed. Rep. 221. And, *a fortiori*, person is a passenger who is received on a freight train for the purpose of being transported, and whose ticket is accepted or from whom fare is received. *Dunn v. Grand Trunk R. Co.*, 58 Me. 187; *International & G. N. R. Co. v. Irvine* (Tex.), 23 Am. & Eng. R. Cas. 518. But a person who travels voluntarily on a train by the permission of the conductor given at his own request, and who pays no fare and selects an open flat car in which to travel rather than a passenger coach, cannot be deemed a passenger in the full, legal sense of the term. At most, he is only so *sub modo* and to a limited extent. *Higgins v. Cherokee R. Co. (Ga.)*, 27 Am. & Eng. R. Cas. 218.

Same—What Employees may Invite or Permit Persons to Travel as Passengers.—If an invitation to travel upon a conveyance on which the person invited would otherwise have no right, is given by a servant without authority to permit persons to ride on the car, and the invitation or permission is not in any sense in the interest of the carrier, or in the course of his employment, a person so travelling does not become a passenger. *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413. But where it is customary to carry passengers on construction trains, persons having no notice of a contrary rule have a right to assume that the conductor has authority to carry persons on such trains, and that the granting of permission by him falls within his general authority as the manager of the train. *St. Joseph & W. R. Co. v. Wheeler* (Kan.), 26 Am. & Eng. R. Cas. 173. If, however, the person invited to travel has knowledge of a rule forbidding passengers to ride upon the particular trains and he pays no fare, he cannot be deemed a passenger. *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98. So, too, where the train is of such a description that the conductor could not be presumed to have authority to permit passengers to ride upon it, an invitation by him to travel will not create the relation of carrier and passenger. *Eaton v. Delaware L. & W. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513.

The engineer has no authority to give permission to any one to ride upon its engine against the rules of the company: *Chicago & A. R. Co. v. Michie*, 83 Ill. 427; *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.), 91; and if the plaintiff in an action alleges that he was a passenger, and

that the duty which the company owed him arose from the consent of the engineer to his riding upon the engine, the burden of proof is upon the plaintiff to establish that the engineer had authority to permit him so to travel, the presumption being that he had no right to be there whether he paid fare or not. *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.), 91.

A fireman has no authority by virtue of his employment, to invite or permit a person to travel upon the tender, and such an invitation cannot create the relation of carrier and passenger. *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210.

A baggage master has no authority to permit persons to travel in the baggage car. *Reary v. Louisville, N. O. & T. R. Co. (La.)*, 34 Am. & Eng. R. Cas. 277.

Same—Newsboys, etc.—If a common carrier of passengers rents a room to a person for the sale of liquors and cigars at a stipulated rent, and contracts to carry him and board him as part of the agreement, he is not an employe, nor is he a member of the establishment, and the company owes him the duty which it owes to passengers. *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71. So, too, where a company in consideration of the payment of a sum of money and of an agreement to supply passengers on a train with iced water, issues season tickets to a person and permits him to sell pop corn on its trains, the relation of such person to the company is that of a passenger, and not of a servant. *Com. v. Vermont & M. R. Co.*, 108 Mass. 7. But a newsboy who is not expected to pay fare and who simply goes aboard a car under a license to pass on and off it for the purpose of selling newspapers, is not a passenger, and while the company cannot needlessly expose him to danger, it owes him no obligation to care for his safety, even though he be a child of tender years. *Fleming v. Brooklyn City R. Co.*, 1 Abb. N. Cas. (N. Y.), 433.

Same—Mail Agents.—A railroad company owes the same degree of care to mail agents riding in postal cars in charge of the mail as it owes to passengers: *Seybolt v. New York, L. E. & W. R. Co. (N. Y.)*, 18 Am. & Eng. R. Cas. 162; *Nolton v. Western R. Co.*, 15 N. Y. 444; *Hammond v. North-eastern R. Co.*, 6 S. Car. 130, 24 Am. Rep. 467; and this is the case although they be carried pursuant to an obligation imposed upon the company by statute. *Collett v. London & N. W. R. Co.*, 16 Q. B. 984. But a mail agent travelling upon a train in the discharge of his duties, is not a passenger within the meaning of the Pennsylvania statute exempting railroad companies from liability for injuries to persons engaged upon or about the cars of a company, but who are not employed by it. *Pennsylvania R. Co. v. Price (Pa.)*, 1 Am. & Eng. R. Cas. 234.

Same—Express Messengers.—An express messenger carried by a railroad company upon its trains pursuant to a contract with the express company, stands in the relation of a passenger: *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505, 516; *Blair v. Erie R. Co.*, 66 N. Y. 313; and a person who temporarily occupies the place of an express messenger, stands in the same position and is entitled to the same protection. *Blair v. Erie R. Co.*, 66 N. Y. 313. But an express messenger is not authorized to introduce a person into the car for the purpose of enabling him to learn the route and take the messenger's place for a few days, and the company does not owe such a person the duties which a carrier owes to passengers. *Union Pac. R. Co. v. Nichols*, 8 Kan. 505.

Same—Drovers Travelling in Charge of Cattle.—A drover travelling upon a pass for the purpose of taking care of cattle is a passenger for hire. *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Missouri Pac. R. Co. v. Ivey*, (Tex.) 37 Am. & Eng. R. Cas. 46, note 53; *Lawson v. Chicago, St. P., M. & O. R. Co.*, (Wis.) 21 *Id.* 249.

Same—Employees Riding to and from Work.—Where a person in the employment of a railroad company travels back and forth from his home to the place where his services are rendered, upon the cars of the company, and his transportation free of charge constitutes part of the contract of service, while so travelling he is an employe and not a passenger, and for injury to him through the negligence of a co-employe engaged in operating the train, the company is not liable. *Abend v. Terre Haute & I. R. Co.* (Ill.), 17 Am. & Eng. R. Cas. 614; *Moss v. Johnson*, 22 Ill. 633; *Capper v. Louisville, E. & St. L. R. Co.* (Ind.), 21 Am. & Eng. R. Cas. 525; *McQueen v. Central Branch U. P. R. Co.* (Kan.), 15 *Id.* 226; *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.), 228; *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.), 466; *New York C. & H. R. Co. v. Vick* (N. Y.), 17 Am. & Eng. R. Cas. 609; *Russell v. Hudson Riv. R. Co.*, 17 N. Y. 134; *Ross v. New York C. & H. R. Co.*, 5 Hun (N. Y.), 488, *aff'd* 74 N. Y. 617; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417; *Ryan v. Cumberland Val. R. Co.*, 23 Pa. St. 284; *Hutchinson v. York, M. & B. R. Co.*, 5 Exch. 343; *Tunney v. Midland R. Co.*, L. R., 1 C. P. 291. See also *Howland v. Milwaukee, L. S. & W. R. Co.* (Wis.), 5 Am. & Eng. R. Cas. 578. But compare *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436; *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Abell v. Western Maryland R. Co.* (Md.), 21 Am. & Eng. R. Cas. 503; *Baltimore & O. R. Co. v. State*, 33 Md. 542. But it has been held that a carpenter working as such for a railroad company and carried on the company's cars to and from his work as part of his contract of hire and in consideration of a reduction in his wages, occupies the position of a passenger upon the train, and is not prevented from recovering by the fact that he suffered injury through the negligence of one of the company's employes; *O'Donnell v. Allegheny Val. R. Co.*, 59 Pa. St. 239; and it would appear that if the employe who was travelling is not engaged in any way in the actual operation of the road,—*e. g.*, if he be a bookkeeper in a railway office,—the rule that an employe cannot recover for injuries caused by the negligence of a fellow servant would not apply. *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108. When an employe is not in the discharge of his duties, but is travelling free of charge on his own business or that of another, he is a passenger in the eye of the law and entitled to recover. *Ohio & M. R. Co. v. Muhling*, 30 Ill. 1. See also *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.), 638.

Plaintiff having at various times been employed by the defendant as detective to recover property stolen from its cars, was requested by defendant to go from one station on its road to another, to aid in discovering the persons who have been guilty of a theft from its cars. The means of conveyance furnished was a hand-car. *Held*, that although the relation of common carrier and passenger did not exist between defendant and plaintiff, the company was bound from the relation of master and servant to provide proper means of conveyance, and see that they were used with due care for plaintiff's safety. *Pool v. Chicago, M. & St. P. R. Co.*, (Wis.) 3 Am. & Eng. R. Cas. 332.

The fact that the conductor of the train received and treated an employe as a passenger, is of no consequence in determining whether his status was that of a passenger or of a fellow servant. *Texas & P. R. Co. v. Scott*, 64 Tex. 549.

As to the relation existing between workmen employed by a contractor and the company, as such workmen are being carried to and from their work, see *Graham v. Toronto, etc.*, R. Co., 23 U. C. C. P. 541, *Sheerman v. Toronto, etc.*, R. Co., 34 U. C. Q. B. 451; *Torpey v. Grand Trunk R. Co.*, 20 U. C. Q. B. 446.

Where the conductor of private cars which formed part of a train under the charge of the employes of the company, at the request of the

company's conductor, cut loose certain cars from the train and immediately resumed his proper place upon the platform, upon resuming his place he again entered into the relation of a passenger to the company, and became entitled to the protection which such relation gave him. *Cumberland Val. R. Co. v. Myers*, 55 Pa. St. 288.

Same—Persons Assisting Passengers.—A person entering a train for the purpose of assisting a passenger, is not himself a passenger. *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.), 64; *Griswold v. Chicago & N. W. R. Co.*, (Wis.) 23 Am. & Eng. R. Cas. 463.

Same—Trespasser—Statutes Providing for Expulsion.—Trespassers have been held not to be passengers within the meaning of statutes forbidding the expulsion of passengers at places other than at regular stations. *Hobbs v. Texas & P. R. Co.*, (Ark.) 34 Am. & Eng. R. Cas. 268; *Chicago & N. W. R. Co. v. Peacock*, 48 Ill. 253; *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428.

ATCHISON, TOPEKA & SANTA FE R. CO.

v.

LINDLEY.

(*Kansas Supreme Court, December 7, 1889.*)

Passenger—Freight Train—Shipper of Live Stock—Contributory Negligence.—Where a shipper of stock was on a freight train accompanying two loads of his stock, which were being transported to market, and the train had attached to it a caboose for the shippers on the train to ride in, and, while the train was stopping at a station, the conductor addressed the shipper as follows: "You get on top, and help signal, until the last load of hogs comes up, and we will water them,"—and the shipper voluntarily obeyed the order or direction, and got upon the train moving backward, and while on the top of the train, near to the end of a car, watching a brakeman trying to make a coupling, was severely injured by a sudden forward motion or jerk of the train, without any signal thereof, *held*, that as the shipper voluntarily placed himself in a position of known danger, and, as he was not upon the top of the train to look after or care for his stock, the railroad company is not liable in damages for his injuries.

Same—Wantonness—Malice.—An examination of the testimony and special findings of the jury do not establish such gross negligence in the case as amounts to wantonness or malice on the part of the railroad company or any of its employees.

ERROR from Circuit Court, Sumner County.

On the 26th day of February, 1887, D. C. Lindley filed his amended petition against the Atchison, Topeka & Santa Fe Railroad Company to recover \$25,000 damages for certain personal injuries received by him on July 16, 1885, at a point upon the railroad between Lawrence and Argentine. On the 21st day of April, 1887, the railroad company filed an amended answer, setting up,—*First*, a general denial; *second*,

contributory negligence; and, *third*, that plaintiff was wrongfully on the train under a stock pass issued to W. T. Lindley, and not to the plaintiff. A copy of the stock contract pass is as follows:

"Atchison, Topeka and Santa Fe Railroad Company.
"Live-Stock Contract.

"Duplicate.

"No. of cars. Initials.

"2,128. at

"13,372. at Perth Station, July 15, 1885.

"Received of James Holland 2 cars of stock (85 head) to be delivered at Kansas City station at special rates, being _____dollars per car for horses and mules.

Wfr. _____ " " " cattle and hogs.

_____ " " " sheep.

"Consigned to G. W. Kefner at Kansas City, Mo., station.

"Agreement made between the Atchison, Topeka and Santa Fe Railroad Company, party of the first part, and James Holland, party of the second part, witnesseth that, in consideration of the above named special rates and other valuable considerations, (hereby acknowledged,) the said party of the second part hereby relieves said party of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be only that of a private carrier for hire. (2) And said party of the second part hereby accepts for such transportation the cars provided by said company, and used for shipment of said stock, and hereby assumes all risk of injury which the animals, or any of them, may receive in consequence of their being wild, unruly, or weak, or maiming each other or themselves, or in consequence of heat or suffocation or other ill effects of being crowded in the cars, or on account of being injured by the burning of hay, straw, or other material used by the owner for feeding the stock, or otherwise; and also all risk of damage or injury or loss whatever which may be sustained by reason of any delay or detention in such transportation, whether occasioned by any mob, strike, or threatened violence to person or property from any source, or injury to track or yards, or any or all other causes, whether mentioned or not, and all risk of the escape of any portion of said stock, or loss of or damage from any other cause or thing not resulting from the willful negligence of the agents of said party of the first part. (3) And said party of the second part further agrees that he will load and unload said stock at his own risk, and feed, water, and attend to the same at his own expense and risk while it is in the stock yards of the party of the first part awaiting shipment, and while on the cars, or at

feeding or transfer points, or where it may be unloaded for any purpose. (4) And it is further agreed that said party of the second part will see that said stock is securely placed in the cars furnished, and that the cars are securely and properly fastened so as to prevent the escape of said stock therefrom. (5) And it is further agreed that, in case the said party of the first part shall furnish laborers to assist in loading and unloading said stock, they shall be subject to the order, and be deemed employes, of said party of the second part while so assisting. (6) And for the consideration aforementioned said party of the second part further agrees that, as a condition precedent to his right to recover any damage for loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock. (7) Agents of this company are not authorized to agree to forward live stock to be delivered at any special time. (8) The evidence that said party of the second part after a full understanding thereof assents to all the conditions of the foregoing contract is his signature thereto.

“A. E. FINCH, Agent for the Company.

“JAMES HOLLAND, Shipper.

“Witness: W. E. KEER. (To be other than either signer of the contract.)

“Not negotiable.

“Notice. Agent will have shipper sign duplicate in copying ink, and take an impression of same, before forwarding or general freight agent.

“Executed in duplicate.

“Form 67. Duplicate.

“Atchison, Topeka and Santa Fe R. R. Co.

“Live-Stock contract.

“From Perth station.

“To stock shippers, agents, and conductors.

“(9) On and after May 1st, 1884, the following rules will govern the issuance of passes to men in charge of live stock, and their return. (10) On shipment of horses, mules, cattle, hogs, and sheep, belonging to one owner, shippers will be passed on freight train with stock, and on contracts as follows: (11) On shipment of one (1) car live stock, one (1) man will be carried free one way in charge of stock, and his contract will be authority for conductors to pass him. No return passes will be given on account shipment one (1) car. (12) One (1) man with two (2) to three (3) cars; two (2) men

with four (4) to seven (7) cars; three (3) men with eight (8) to twenty (20) cars; four (4) men with twenty-one (21) cars or more, which is the maximum number that will be passed with stock for one owner. (13) The agent at the station where the stock is loaded will enter on the back of the contract in ink, and erase with ink the spaces not used, the name or names of the persons who are actually entitled to pass free with stock, which is the authority for the conductors to accept such, and pass the parties. When no return pass is given, forwarding agent will erase with ink the space provided for return pass. (14) Names entered in pencil will not be accepted by conductors when no person is in charge. Erase all the spaces on the back of the contract. Agents will refuse to enter any names on the contract but those of the owner or employes in charge of stock, without regard to passes required by the number of cars. (15) It is understood that the shippers are passed on freight trains to take care of their stock, and stock contracts, except to return, countersigned as below, are not good on passenger trains. (16) Return passes good on all trains that carry passengers will be given to the parties passed with stock on stock contracts only, and will not be accepted unless countersigned and stamped by the general freight agent at Topeka, or by the agent at the station to which stock is contracted. (17) Return passes will not be given unless contracts are presented within ten (10) days from their date, and will be good only when used within three (3) days after being countersigned and stamped. When contract is presented for return trip, conductor of last division will be particular to take up and return it to the general freight agent. (18) Contracts for single car shipments must be taken up on the trip, (see note ten,) and returned to auditor with ticket collections by conductors of last division. No return pass will be given on account of emigrant outfit. (19) For other rules governing the shipment of live stock, see local tariff. H. C. BARLOW, General Freight Agent.

“Release.

“(20) We, the undersigned, in charge of live stock mentioned in the within contract, in consideration of the free pass granted us by the Atchison, Topeka and Santa Fe Railroad Company, hereby agree that said company shall not be liable to us for injury or damage of any kind suffered by us while in charge of said stock, or while traveling upon such free pass. WM. F. LINDLEY, with two cars, the number of which are noted within, July 15th, 1885.

“(21) Pass, on freight trains only, Wm. F. Lindley, party in charge accompanying stock. E. A. FINCH, Agent.

“(22) Only names of parties entitled to pass must be entered,

and draw a pen through the blank spaces. Agents will make, and have signed, two copies of contract, giving original to shipper, and sending duplicate to general freight office.

"Atchison, Topeka and Santa Fe Railroad Company. Good for return passes from — to — for the person or persons named above, if stamped or countersigned by the general freight agent, or agent at delivery station.

"Void unless used within three (3) days from date."

Trial had at the May term of the court for 1887, before the court with a jury. The jury returned a verdict for the plaintiff for \$9,650. The jury also made the following special findings of fact: "(1) After watering the car of hogs on the first section of the train, where did the plaintiff, D. C. Lindley, go? Answer. On the top of the rear of the portion of the train attached to the engine. (2) Where did the plaintiff, D. C. Lindley, first go after getting on top of the train? If towards the engine, how many cars? A. On the second or third car from the rear portion of that portion of the train attached to the engine. (3) For what purpose, if any, did the plaintiff, D. C. Lindley, go to the rear car on the first section of the train after going towards the engine? A. It is not clear to the minds of the jury. (4) What, if anything, did the plaintiff, D. C. Lindley, do after reaching the rear car of the first section, and upon what part of the rear car did he stand? In what direction was he looking? A. Walked to rear end of run-board in centre of car, towards the detached portion of the train. (5) What caused the plaintiff, D. C. Lindley, to fall from the car? A. By a sudden forward motion of the train. (6) Was the plaintiff, D. C. Lindley, guilty of negligence in going to the end of rear car of the first section of the train? A. Not by reason of going. (7) Did the engineer who was operating the engine at the time of the accident see the plaintiff, D. C. Lindley, on the top of the first section of the train to which the engine was attached, at any time just prior to or at the time of the accident? A. We do not know. (8) Were any of the trainmen on the train under the influence of intoxicating liquor? If so, who? A. We do not know. (9) Were any of the men who were running and operating the train guilty of any negligence at the time of the accident? If yes, in what did it consist? A. Yes; in the hurried manner in which the employes of the said train managed the same. (10) Was the plaintiff, D. C. Lindley, guilty of negligence in going on top of the train at Eudora just prior to the accident? A. No. (11) Who made the coupling at the time of the accident, and was he the head or rear brakeman? A. Guy, the head brakeman. (12) Was the plaintiff, D. C. Lindley, watching the

brakeman between cars making the coupling at the time of the accident? A. Yes. (13) Was it part of the duties of the plaintiff, D. C. Lindley, in taking care of the two carloads of stock on the train, to assist the trainmen in the management, running, or coupling of the cars on the train, and making signals to the engineer? A. No. (14) How much was the damage to the plaintiff, D. C. Lindley, on account of expenses while at Kansas City, Mo., and in what do they consist? Answer fully. A. About 333 dollars; doctor bills, nurse, and board. (15) Did the engineer who was operating the engine at the time of the accident, and just prior thereto, have any knowledge that the plaintiff, D. C. Lindley, was on top of the train of cars attached to the engine? A. We do not know. (16) Did the engineer who was operating the engine at the time of the accident to the plaintiff, and just prior thereto, use ordinary care in handling the engine? A. No." The railroad company filed its motion for judgment upon the special findings of the jury, notwithstanding the verdict, and also filed its motion for a new trial. These motions were heard on the 6th day of June, 1887, and taken under advisement until the next term of the court. At the September term of the court for 1887 the motions were overruled, and judgment was rendered in favor of the plaintiff, and against the railroad company, for the sum of \$9,833. The railroad company excepted and brings the case here.

George R. Peck, A. A. Hurd, and Robert Dunlap for plaintiff in error.

Charles Willsie and McDonald & Parker for defendant in error.

HORTON, C. J.—This was an action by D. C. Lindley against the Atchison, Topeka & Santa Fe Railroad Company for injuries received while traveling on a stock train, and resulted in a verdict against the company for \$9,650. McCambridge was the conductor of the train, Allen was the engineer, and Guy the head brakeman. Lindley was a live-stock dealer, 50 years of age, residing in Albion, Harper county, in this state. He had shipped live-stock for 34 years. The alleged cause of action occurred on the 16th day of July, 1885. Lindley had shipped on the defendants' train one car load of hogs, and one car load of cattle, from Perth Station, in Sumner county, to be transported to Kansas City, Mo., and was on top of one of the stock-cars just before his injuries. He arrived at Eudora, a station between Topeka and Argentine, between 5 and 6 o'clock in the morning. The train consisted of 45 cars, loaded with stock. Soon after arriving at Eudora, 8 or 10 of the cars, with the

Facts.

caboose, broke or separated from the main train. The petition alleged, among other things, that "the conductor then in charge of the train, totally disregarding the safety of human life, and being grossly careless of the safety of the passengers on the train, and well understanding the culpably negligent manner in which the engineer was handling the train, carelessly and negligently asked, directed, and induced the plaintiff to climb up on the top of the cars, and signal for the front portion of the train to be backed up so as to have the rear and front portion of the train coupled together, and then signal the cars containing hogs needing water in the hind part of the train, so that the conductor could water them. That the front part of the train was then backed up to the hind portion of the train; and while the brakeman was between the cars making the coupling, and while plaintiff was on top of the cars, looking in an opposite direction from the engineer, the latter, then and there operating the engine of the train, did then and there, with gross and wanton negligence, and with utter disregard for human life, without any warning suddenly throw open the throttle of the engine, and turn on all the steam-power possible, so that the engine started up with the cars with so much force and power that the life of any human being upon the top of the train was unsafe. That the train started up so suddenly, and with such a tremendous jerk, that it threw the plaintiff clear off of his feet, and pitched him head foremost down upon the railroad track, where he would have been run over and mashed, if he had not been snatched from his perilous condition."

The evidence upon the part of Lindley tended to show that when the train stopped at Eudora he got out of the caboose with McCambridge, the conductor, and T. V. Borland, another shipper having stock upon the train; that they walked up to the water tank; that the engine and three car-loads of hogs had passed the tank; that the plaintiff then asked the conductor if he would not back up the train, and water the three cars that had passed the tank: that the conductor said, "No; the hogs are not yours;" that finally, the train was backed up to water or shower the hogs; that the conductor, who was standing at the water-tank, looking down at Lindley and Borland, said, "You fellows stand down there and, when a car load of cattle or horses come along that you don't want watered, throw down your hands, and I will turn the water off; and when you come to a car-load of hogs, throw up your hands, and I will shower them;" that Lindley and Borland did as the conductor suggested; that about a dozen or fourteen car-loads of hogs were then watered; that,

when the last car-load of those cars were watered, the conductor looked down again, and said to Lindley and Borland, "You fellows get up on top, and help signal until the last car-load of hogs comes up, and we will water them;" that Lindley and Borland got upon the top of the train as requested; that Lindley got upon the hind end, but stepped from there to a car near the engine; that Borland remained on the end car; that the train then backed down to where the detached portion of it was; that, when the train got down to the detached cars, it stopped quite a long time; that Lindley had curiosity enough to walk down where Borland was; that at this time the train was standing still; that when the plaintiff came near to where Borland was, the brakeman was in the act of coupling the cars; that the plaintiff saw Borland looking down at him; that plaintiff walked up towards Borland, and got near the end of the car; that just at that moment Borland threw up his hands, and said, "Look out!" that the crash then came; that the coupling-pin broke, and the cars separated; that Lindley fell off and was severely bruised and injured.

The court charged the jury, among other things, as follows: "If you find, from the evidence, that the plaintiff went upon the top of the train at the request of the conductor of the train to assist the trainmen in giving signals to the engineer to back up the train for the purpose of coupling onto the part which had been detached, you would be justified in finding that he went upon the train voluntarily, as the conductor, in so doing, would be acting beyond the scope of his employment." The jury also made the following findings of fact: "Who made the coupling at the time of the accident, and was he the head brakeman? Guy, the head brakeman. Was the plaintiff, D. C. Lindley, watching the brakeman between the cars making the coupling at the time of the accident? Yes. Was it a part of the duties of the plaintiff, D. C. Lindley, in taking care of the two car-loads of stock on the train, to assist the trainmen in managing, running, or coupling the cars on the train, and in making signals to the engineer? No." The plaintiff contends that he was thrown or pitched off of the top of the car by a sudden forward motion of the train; and in this he is supported by the findings of the jury. The defendant insists that Lindley fell off the car while the slack of the train was running out.

The important question in the case is whether, under the allegations of the petition, the testimony of the plaintiff, the instructions of the court, and the special findings of the jury, the plaintiff is entitled to recover. We think not. Lindley knew, according to his own testimony, the places of danger

and safety upon the train. He was under no obligation to climb upon the top of the train, and signal the conductor or any other employe. "Out of curiosity," he walked down to the end of the car, where the brakeman was coupling the train. At the time of the accident, he was watching the brakeman coupling the cars. He assumed a position on the top of the cars which he knew was peculiarly dangerous and perilous. It was not necessary for him to be there to care for his stock, or as a passenger. The order or direction of the conductor to him "to go on top of the cars and help signal" was entirely without the routine of the conductor's duties; and, as it was voluntarily obeyed by Lindley, it could not fasten any liability on the railroad company. If he acted as an employe or brakeman, it was of his own volition. He occupied merely the position of a passenger who voluntarily assumed a very dangerous position to make signals at the request of the conductor, as a matter of accommodation.

In *McCorkle v. Chicago, R. I. & P. R. Co.* (Iowa), 18 Am. & Eng. R. Cas. 156, it is said: "Plaintiff got off a cattle train at night to examine his cattle, when the train stopped for that

purpose, and, not hearing the signal to start, attempted to get on a freight-car after the train had started, because he supposed, from the 'lively rate' the train was moving, he would not be able to get on the 'caboose,' at the rear of the train, which had been provided for passengers. At the time he attempted to get on the freight-car, he had a 'prod-pole,' and a lantern in his hand. His foot caught in a hole caused by a defective plank in the bridge over which the train was passing, and he fell from the car and was injured. Held that he was guilty of contributory negligence, and not entitled to recover."

In *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21, 1 Am. & Eng. R. Cas. 87, it is said: "On the other hand, should a passenger insist upon riding upon the cow-catcher, in the face of a rule prohibiting it, and, as a consequence, should be injured, I apprehend it would be a good defense to an action against the company, even though the negligence of the latter's servants was the cause of the collision or other accident by which the injury was occasioned; and if the passenger thus recklessly exposing his life to possible accidents were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge, or even the assent, of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true, the conductor has the control of the train, and may assign passengers their seats; but he may not assign a passenger to a seat

Plaintiff not entitled to recover.

Authorities examined.

on the cow-catcher, a position on the platform, or in the baggage car. This is known to every intelligent man, and appears upon the face of the rule itself. He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so as to make the company responsible."

In *Lehigh Valley R. Co. v. Greiner*, 113 Pa. St. 600, 28 Am. & Eng. R. Cas. 397, it is said: "Where one negligently and without excuse places himself in a position of known danger, and thereby suffers an injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened."

In *Little Rock & Ft. S. R. Co. v. Miles*, (Ark.) 13 Am. & Eng. R. Cas. 10, it is said: "But there are certain portions of every railroad train which are so obviously dangerous for a passenger to occupy, and so plainly not designed for his reception, that his presence there will constitute negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position. A passenger who voluntarily and unnecessarily rides upon the engine or the tender, or upon the pilot or bumper of the locomotive, or upon the top of a car, or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind, and ordinary intelligence. * * *"

In *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210, an engine with one freight car had been detached from a train and was stopped at a water-station. The fireman requested a small boy, standing near, to put in the hose and turn on the water. While he was clinging on the tender to do this, the other freight cars belonging to the train came down without a brakeman, and struck the car behind the tender. The boy fell and was crushed to death. The court held that the company owed no special duty to the boy, saying: "The case turns wholly on the effect of the request of the fireman, who was temporary engineer. Did that request involve the company in the consequences? * * * The fireman, through his indolence or haste, was the cause of the boy's loss of life. Unless his act can be legally attributed to the company, it is equally clear the company was not the cause of the injury.

The maxim, *qui facit per alium facit per se*, can only apply where there is an authority, either general or special. It is not pretended there was a special authority. Was there a general authority which would comprehend the fireman's request to the boy to fill the engine tank with water? This seems to be equally plain without resorting to the evidence given that engineers are not permitted to receive any one on the engine but the conductor and fireman or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity."

In *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, Jones was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were usually conveyed by the company to and from the place where their services were required, and a box-car was assigned to their use. Mr. Justice SWAYNE, delivering the opinion of the court, said: "The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have got into the box-car, in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant, nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."

In *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, it was decided that "a railroad company is liable, as principal, for injuries received by a person who was employed by the conductor of a freight train as a brakeman during the trip, while acting under the orders of the conductor in coupling cars;

but not if the person so acting and injured was only a passenger who was not employed by the conductor, nor under any obligation to obey his orders." In the opinion rendered by Chief Justice STONE it was said that, "So far as this count informs us, the plaintiff was a mere passenger on the train; and, so far as the right to control or direct the movements of the plaintiff is shown in this count, the conductor would have had as much authority over any other passenger, or even a bystander, as he had over him. Such order or direction as averred is entirely without the routine of the conductor's duties."

In *Georgia Pac. R. Co. v. Propst*, 85 Ala. 203, 38 Am. & Eng. R. Cas. 11, the conductor addressed the plaintiff as follows: "Will, come here, and make this coupling for me," and the plaintiff was injured in conforming to this order or request. The court said such an order or direction could not fasten a liability on the railroad corporation. See, also, *Gilham v. South & N. Alabama R. Co.*, 70 Ala. 268, 15 Am. & Eng. R. Cas. 138; *Howard v. Kansas City, F. S. & G. R. Co.*, 41 Kan. 403, 37 Am. & Eng. R. Cas. 552.

We are referred to *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, as decisive in favor of the recovery of the plaintiff. That case decides that a shipper accompanying his stock on the train is entitled to the rights of a passenger, but in many particulars widely differs from this. In that case the shipper was commanded by the conductor to get out of the caboose, and go on top of the train, because the caboose was about to be detached. The shipper had no choice but to obey, or leave his stock to go forward without any one to accompany or take care of them. In this case there was a caboose accompanying the train, where the plaintiff might have ridden in safety. He did not go upon the top of the train to accompany his stock, or to take care of them. He went, as before stated, merely to comply with the order or request of the conductor to assist in signaling the train. The other cases referred to by the plaintiff are not contrary, we think, to the law as before declared.

In answer to one of the questions, the jury stated that the plaintiff was not "guilty of negligence in going on top of the train at Eudora just prior to the accident." This finding of the jury, however, is not conclusive. If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, so that a verdict for the plaintiff, if one should be returned, would be set aside, the court may properly direct a verdict for the defendant without submitting the evidence to the jury. In *Atchison, T. & S. F. R. Co. v. Plunkett*,

25 Kan. 188, 2 Am. & Eng. R. Cas. 127, the jury found that Plunkett, at the time of his injuries, was in the exercise of reasonable and ordinary care. This finding was not considered sufficient to authorize the verdict, in view of the testimony and the other findings. Mr. Justice VALENTINE, in that case, said: "If the findings in detail contradict the general findings we may order the verdict to be rendered in accordance with the findings in detail, and wholly ignore the general findings. For instance, where a question of negligence arises in the case, the jury cannot be allowed to say conclusively, after finding certain special facts, that these facts constitute negligence, when in fact and manifestly they do not constitute negligence.

Finally it is claimed that, although Lindley might have been guilty of contributory negligence, he is entitled to recover because the conductor and engineer of the railroad company were guilty of gross negligence. Neither the findings of the jury nor the testimony introduced in the case establish that the company or any employe was guilty of such gross negligence as amounted to wantonness. *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 34 Am. & Eng. R. Cas. 316; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531, 37 Am. & Eng. R. Cas. 320. Allen, the engineer, testified that the fireman signaled him to stop. Bradshaw, the fireman, testified that Guy, the head brakeman, signaled him. The jury found that the engineer did not see the plaintiff on top of the train just prior to the accident, therefore he was not actuated either by gross negligence or malice towards him or any one else. The conductor did not give the engineer the signal to move forward. The jury, in returning their answers about the negligence of the employes of the train, found as follows: "Were any of the men who were running or operating the train guilty of any negligence at the time of the accident? If yes, in what did it consist? Answer. Yes; in the hurried manner in which the employes of the train managed the same. Question. Did the engineer who was operating the engine at the time of the accident to the plaintiff, and just prior thereto, use ordinary care in handling the engine? A. No." These answers do not tend to show malice or gross negligence. The judgment of the district court will be reversed, and the cause remanded for a new trial; all the justices concurring.

Gross negligence—Evidence. **Contributory Negligence—Drover Travelling upon Top of Train.**—See *Little Rock & Ft. S. R. Co. v. Miles* (Ark.), 13 Am. & Eng. R. Cas. 10.

MISSOURI PACIFIC R. CO.

v.

CALLAHAN.

(Texas Supreme Court, November 5, 1889.)

Passenger—Personal Injuries—Drover—Pleading.—Where plaintiff sues to recover damages for injuries sustained by him while travelling in charge of cattle, and the petition alleges that having left the caboose for the purpose of attending to his cattle, the train started without notice to him and he was compelled to get upon the top of a car; that he sat down upon the car; and that upon the invitation of the conductor he started towards the caboose, and in attempting to enter the caboose from the top was struck by a water pipe, the averments in the petition as to the reason why he went on the top of the train and that he entered the caboose at the request of the conductor, are not open to exception.

Same—Evidence—Opinion that Injury Permanent.—In an action for personal injuries, the opinion of a witness who attended the plaintiff, that his injuries are permanent, is admissible although two years have elapsed since the time of the accident.

Same—Contributory Negligence—Evidence.—Evidence that plaintiff who was travelling with cattle and had got upon the top of the train, proceeded to the caboose at the request of the conductor in order to sign a statement that the cattle were in good order at the end of the defendant's line which they were then nearing, is admissible as bearing upon the question of the plaintiff's contributory negligence in attempting to enter the caboose from the top.

Same—Drover—Notice of Starting of Train.—Where a person in charge of cattle leaves the caboose for the purpose of attending to them and gets upon the top of the train upon its starting, evidence that no notice of the starting of the train was given to him is admissible in an action for damages.

Same—Evidence—Position of Water Pipe.—Where plaintiff was injured while upon the top of a car by being struck by the pipe of a water tank, he may state in his evidence the position of the water pipe when it struck him, and that it could not have struck him had it been placed in its usual position, when not used for supplying the tender.

Same—Entering Caboose from Top.—Where the evidence shows that a person in charge of cattle attempted to enter the caboose from the top at the place fixed for employes to enter, and there was no evidence tending to show that it was obviously dangerous so to enter, nor that plaintiff was negligent in the manner of his attempt to enter, a verdict in his favor is sufficiently supported by the evidence.

APPEAL from District Court, Tarrant County.

Finch & Thompson for appellant.

Wynne & Stedman for appellee.

STAYTON, C. J.—Appellee brought this action to recover damages for an injury alleged to have been received by him

through negligence of the employes of appellant while travelling on its train, attending to cattle he had shipped.

Complaint.

The contract provided that he should take care of his own cattle while in transit; and his proper place while the train was in motion was shown to be in the caboose, which was the rear car in a long train. The injury occurred while he was on the top of the cars; and, no doubt for the purpose of relieving himself from the charge of contributory negligence, he alleged: "That on the 28th day of June, 1886, during the transportation of said cattle from Hodge station to Chicago, and when the train on which said plaintiff and said cattle were being conveyed had reached Missouri river, on defendant's line of railway, said train stopped at said Missouri river for the purpose of taking water. That, when said train stopped for said purpose, plaintiff, as is customary when cattle trains so stop, got out of the caboose of said train, for the purpose of punching up said cattle with a prod; and that, soon after he had gotten out of said caboose for said purpose, said train suddenly started, without giving him sufficient notice to enable him to re-enter the caboose, and he was compelled to climb up on the train, rather than be left behind. That, after having climbed up on said car, plaintiff sat down on the top of said car; and that, after having sat there for a few minutes, upon invitation of the conductor in charge of said train, he started towards the caboose. That he reached the cupola of the caboose in safety, and proceeded to enter the door of the cupola, with the view of descending the steps leading into the caboose. In order to safely enter said cupola, and get on the steps leading into the caboose below, plaintiff, with both hands, seized an iron rod provided for the purpose, above the door, to turn around; that being the customary and proper manner of getting into the cupola, and descending into the caboose from the outside. That, as plaintiff was in the act of entering the cupola and descending into the caboose, having turned around, as aforesaid, he was stricken in the breast with a large water pipe, then and there attached to a water tank, known as 'Burton Water Tank,' on defendant's railway." He then alleged the nature and extent of his injury.

Exceptions were filed to so much of the petition as alleged why he went on top of a car rather than the caboose, and that he went to and was entering the caboose from the top of the car at the request of the conductor. The court overruled the exceptions, and in this there was no error.

**Pleading—
Reasons for
going on top
of car.**

A physician who attended him while under treatment for the injuries, about two years having elapsed, testified to the nature and extent of his injuries, and gave it as his opinion

that they were permanent. This evidence was objected to on the ground that too great a length of time had elapsed, between the time of the injury and the time the testimony was given for the physician to have sufficient knowledge to give an opinion. It was not necessary, to entitle the opinion of the physician to admission, that he should have examined appellee recently; and he could as well form such an opinion from what he saw soon after the injury was inflicted as from recent observation. An opinion formed from a recent examination might be of more value than one formed from an examination two years before he testified by deposition, but this would not affect the admissibility of the evidence.

Evidence as to nature and extent of injuries.

There was evidence admitted to show that after appellee reached the car top, and was sitting down, the conductor, while the train was in motion, sent a request to him to come to the caboose in order to sign a statement that the cattle were in good order at the end of appellant's line, which they were then nearing, as evidence that appellant had complied with the shipping contract—the cattle soon to pass into the hands of another carrier. This evidence was objected to, but we do not see that it was error to receive it. It had some bearing on the question of contributory negligence, but would not relieve appellant if the act which he did at request of conductor was one obviously dangerous, if done in the exercise of proper care.

Conductor's request to come to caboose.

It is claimed that the court should not have admitted evidence to show that no notice of the movement of the train was given to enable appellee to reach the caboose before the train started. It appears to have been usual and proper for appellee to alight from the train when it stopped, to look after his cattle; that he did so; that his cattle were in cars near the center of the train, which at first moved slowly, but would probably so accelerate its speed before the caboose reached him as to make it unsafe to attempt to board it, while he might safely board the car which he did; that he was under obligation to be with, and attend to, his cattle. Under this state of facts, we are not prepared to say, as matter of law, that notice was not required to be given before the train moved. If, by the failure of appellant to exercise proper care, appellee was put to his election to go on top of a car or to be separated from his cattle, we are not prepared to say that it was not proper to show the facts which forced such election upon him, with a view to relieve him from the charge of contributory negligence in reference to a matter having a remote bearing on the accident.

Notice of starting of train.

It certainly was proper for appellee to state the position of the water pipe when it struck him; and it was not error to permit him to state that it could not have struck him, had it been placed in its usual position when not used to conduct water from the water tank to a tender.

**Position of
water pipe.**

The court correctly instructed the jury as to the degree of care necessary to be used by appellant to relieve it from liability for an injury to appellee while a passenger, and also as to the effect which the failure of appellee to use due care would have upon his right to recover, and did not err in refusing to give the several charges asked by appellant, and referred to in assignments of error. All but one of these charges were either erroneous or misleading; and the one presented nothing not substantially given in the main charge, in language clear and appropriate. The charges of the court, given at request of appellee, did not assume that the failure of the conductor to give some signal before starting the train was negligence, but left the jury free to determine whether, under all the facts in evidence, the injury resulted through the want of due care on the part of the servants of appellant. Nor did the charges tend to induce the jury to believe that the failure to give such notice was the proximate cause of the injury. In the main charge the court had instructed the jury that appellant would be liable only in the event of such negligence on its part as was the proximate cause of the injury; and, further, that, even if such negligence existed, that would not entitle appellant to recover, if he was guilty of contributory negligence. The charge also informed the jury what was meant by "proximate cause," and defined the term "contributory negligence." The starting of the train without notice had but a remote bearing on any question involved in the case, but it was a fact which might be looked to in determining whether appellee was guilty of contributory negligence in being on the car top, and especially so when it was contended that appellant owed him no duty when outside of the caboose. The court, with propriety, might have refused to give the charges complained of, after giving the main charge; but the giving of them furnishes no ground for reversal, as they were neither erroneous nor misleading.

It is contended that the verdict of the jury is contrary to the evidence, in that the evidence clearly showed that appellee failed to use due care in attempting to enter the caboose from its top. The evidence shows that appellee was attempting to enter the caboose at the place fixed for employes to enter from the top; and there is no evidence tending to show that it was obviously dangerous so to enter, nor that appellee was negligent in the

**Due care in
entering ca-
boose.**

manner of his attempt to enter. The injury did not occur by reason of any danger necessarily attending an attempt to enter the car from above; nor, so far as the evidence shows, from the negligent manner in which the entry was attempted, but from the water pipe, which overhung the top of the cars; which it would not have done had it been in its proper position. Whether appellee ought to have seen it and protected himself from injury from it, was a question for the jury.

The verdict seems large; but, looking to the nature of the injuries shown to have been received by appellee, we cannot say that the damages are excessive. There is no error in the judgment, and it will be affirmed.

LOUISVILLE & NASHVILLE R. Co.

v.

BISCH.

(*Indiana Supreme Court, November 1, 1889.*)

Passenger—Contributory Negligence—Travelling on Platform of Freight Train.—A passenger who remains on the platform of a car at the rear end of a long train of freight cars after warning to leave it, voluntarily occupies a place of danger and assumes the risk of injury from the jerking of the train in starting.

APPEAL from Circuit Court, Warrick County.

Action by Victor Bisch against the Louisville & Nashville R. Co. to recover damages for personal injuries received whilst a passenger upon one of defendant's freight trains. Defendant appeals from a judgment for the plaintiff.

James M. Shackelford and *S. B. Vance* for appellant.

Denby & Kumler and *Gilchrist & DeBruler* for appellee.

ELLIOTT, C. J.—The appellee entered a car at the rear end of a freight train standing on the appellant's track. He right-fully entered the car as a passenger. After remain-
Facts.
 ing in the car a short time he walked out upon the rear platform, and while standing there the train was started with a sudden jerk, and he was thrown to the ground and injured. There is evidence tending to prove that he was requested by the appellant's employes to leave the platform, and enter the car, and that he disregarded this request or order, and remained on the platform. The evidence also shows that there were from 15 to 20 freight cars attached to

the locomotive, and there was much evidence to the effect that because of the slack between the cars a freight train cannot be started without a jerk. The appellee in his testimony says: "I knew freight trains did not go so smoothly as a passenger train. If there had been no slack, there would have been no jerk." The court instructed the jury that unless the plaintiff proved that he was not guilty of contributory negligence there could be no recovery, but there were no instructions defining "contributory negligence;" for all the instructions upon this subject were expressed in general terms.

One of the instructions given by the court reads thus: "Even if the jury find from the evidence that the plaintiff had been warned against standing on the platform, and had been directed to go inside, and had disobeyed the instruction, still if the jury also believe from the evidence that the conductor of the train, at the moment of giving the signal to start, actually saw the plaintiff on the rear platform of the caboose, in the act of entering or attempting to enter the caboose, and knew that he was in a dangerous position, and gave the signal to start while the plaintiff was in that position, and without giving him a reasonable time to enter, and that by a sudden jerk in starting the cars the plaintiff was thrown to the ground and injured, then the jury should find for the plaintiff." This instruction cannot be rescued from condemnation. Leaving out of consideration minor matters of objection, and placing our decision upon broad grounds, we adjudge that the instruction is so radically wrong as to compel a reversal of the judgment. The plaintiff by refusing obedience to the directions given him, and by voluntarily remaining in a place of danger after warning, assumed the risk of injury. The case, as it appears in the hypothesis on which the instruction proceeds, is a stronger one than the ordinary case of contributory negligence; for the plaintiff did more than carelessly seek and remain in a place of danger, for he remained there in disobedience of directions given him, and despite the warnings which he received. He in fact assented to the injury. The case goes beyond the operation of the rule on the subject of contributory negligence, and comes within the scope of the maxim, *volenti non fit injuria*. Around the central proposition that the plaintiff voluntarily assumed the risk by remaining in a place of danger, in disobedience of directions and warnings, may be grouped various subsidiary doctrines, which fortify and strengthen it. A passenger is justified, as a general rule, in obeying the direction of the employes of the carrier, and if he receives injury in obeying them the carrier is liable, even if it appears that if he had not obeyed he would have escaped

Assumption of risk by travelling on platform.

injury. *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind. 26-29, 31 Am. & Eng. R. Cas. 36; *Louisville & N. R. Co. v. Kelly*, 92 Ind. 371, 13 Am. & Eng. R. Cas. 1; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 18 Am. & Eng. R. Cas. 234; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 11 Am. & Eng. R. Cas. 109; *Pennsylvania Co. v. Hoagland*, 78 Ind. 203, 3 Am. & Eng. R. Cas. 436; *Pool v. Chicago, M. & St. P. R. Co.*, 53 Wis. 657, 3 Am. & Eng. R. Cas. 332; *Hanson v. Mansfield R. & Transp. Co.*, 38 La. Ann. 111; *Filer v. New York R. Co.*, 59 N. Y. 351; *St. Louis, I. M. & S. R. Co. v. Cantrell*, 37 Ark. 519, 8 Am. & Eng. R. Cas. 198; *Fowler v. Baltimore & O. R. Co.*, 18 W. Va. 579, 8 Am. & Eng. R. Cas. 480; *Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.), 429; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162, 31 Am. & Eng. R. Cas. 61.

If the passenger may safely obey such directions, it must be for the reason that it is his duty to do so, and it follows that if he refuses to do so he is guilty of a breach of duty. One who is himself guilty of a breach of duty, and wrongfully remains in a place of danger, cannot recover if that wrong was the proximate cause of his injury, although another may have also been in fault. To authorize a recovery the case must be one "of un-mixed negligence." This case strikingly illustrates this rule, for had the plaintiff entered the car, as it was his duty to do, the injury would not have befallen him. Clearly, then, his own wrong was the proximate cause of his misfortune. *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. St. 234. Not only did the plaintiff, upon the theory on which the instruction is constructed, disobey a direction given him, but he remained in a place of danger where he ought not to have remained, even if he had not been warned and directed to leave it. There are very many decisions which affirm that one who remains on the platform of a train about to move, or which is in motion, although it is a regular passenger train, is, in the absence of explanatory circumstances, guilty of such negligence as will bar a recovery. *Secor v. Toledo, P. & W. R. Co.*, 10 Fed. Rep. 15, 6 Am. & Eng. R. Cas. 616; *Blodgett v. Bartlett*, 50 Ga. 353; *Camden & A. R. Co. v. Hoosey*, 99 Pa. St. 492, 6 Am. & Eng. R. Cas. 454; *Hickey v. Boston & L. R. Co.*, 14 Allen (Mass.), 429; *Willis v. Long Island R. Co.* 34 N. Y. 670; *Smotherman v. St. Louis, I. M. & S. R. Co.* 29 Mo. App. 265. But we do not decide whether these decisions declare the law correctly or not. It is sufficient for our purpose and for this case to affirm that a passenger who remains on the platform of a car at the rear end of a long train of freight

Refusal to
obey direc-
tions.

cars, after warning to leave it does voluntarily occupy a place of danger.

We confine our decision to the case of one riding on a freight train, since that is all the case presented by the record requires. There is, it is our duty to say, a difference between freight trains and regular passenger trains. Passengers assume the risks incident to the means of transportation they adopt, and one who takes passage on a freight train, although it has a caboose attached for the transportation of passengers, must take notice of the character of the train, and use such ordinary care to avoid injury as the nature of the mode of transportation renders prudent. *Woolery v. Louisville, N. A. & E. R. Co.*, 107 Ind. 381, 27 Am. & Eng. R. Cas. 210; *Wallace v. Western N. Car. R. Co.*, 98 N. Car. 494, 34 Am. & Eng. R. Cas. 553; *Harris v. Hannibal & St. J. R. Co.*, 89 Mo. 233; 27 Am. & Eng. R. Cas. 216; *Murch v. Concord R. Co.*, 29 N. H. 9; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558. One of the risks which ordinary prudence requires a passenger on the caboose of a freight train to guard against is that arising from the sudden jerk of the train on starting, resulting from the taking up of the slack between the cars. This is a matter of common knowledge of which an adult has no right to be ignorant, and with this knowledge he has no right to put himself in a position where it is probable that he will be thrown from the car when the train is put in motion. In this instance, the plaintiff, having remained in such a position, heedless of warning and in disobedience of instructions, has no cause of action. In assuming that upon the hypothetical case stated in the instruction he might recover, notwithstanding his own wrong, a fatal error was committed. Judgment reversed.

Contributory Negligence—Travelling on Platform.—See *Alabama G. S. R. Co. v. Hawk* (Ala.), 18 Am. & Eng. R. Cas. 194, note 201; *Indiana B. & W. R. Co. v. Burdge* (Ind.), 18 *Id.* 192; *Wood v. Lake Shore & M. S. R. Co.* (Mich.), 8 *Id.* 478; *Camden & A. R. Co. v. Hoosey* (Pa.), 6 *Id.* 454, note 460; note 13 *Id.* 27.

LUSBY

v.

ATCHISON, TOPEKA & SANTA FE R. CO.

(U. S. Circuit Court, D. Colorado, January 21, 1890.)

Passenger on Freight Train—Injuries—Weight of Evidence.—Where plaintiff who was injured while a passenger on a freight train testifies that as the train neared the station he arose to look out, when a sudden jerk threw him down, and that he lay in the caboose in pain whilst switching was going on at the station, and the defendant's witnesses testify that the injury occurred as the train was preparing to leave the station, and not whilst it was approaching it, a verdict for the plaintiff will not be set aside, the weight of the evidence and credibility of the witnesses being for the jury.

Same—Contributory Negligence—Rising to Look Out.—The question whether a passenger in the caboose of a freight train is guilty of negligence contributing to his injuries by rising to look out upon approaching a station is for the jury.

AT LAW. On motion for new trial.

Peterson & Thomas for plaintiff.

C. E. Gast and Wells, McNeal & Taylor for defendant.

PHILLIPS, J.—This is an action for personal injuries sustained by the plaintiff while a passenger on one of defendant's freight trains running from Pueblo, Colo., to the town of Coolidge, in the state of Kansas. The case was tried by a jury, before HALLETT, J. Verdict for plaintiff. The case now stands on motion for new trial; and, by request of Judge HALLETT, I sat with him on the hearing of this motion. Not having time and opportunity, while holding court at Denver, to confer with him respecting the motion, at his request I submit for his consideration the views entertained by me respecting the merits of the motion.

The facts of the case, about which there is little controversy, are, briefly, as follows: The plaintiff, aged about 60 years, had some time prior to the accident been in defendant's employ at its train yards at Pueblo as a machinist, and had thereby become acquainted with the conductor and trainmen in charge of the freight train in question. He was not, however, so in the employ of the defendant at the time of the injury. On the 12th day of July, 1885, it being Sunday, he applied to the conductor in charge of a freight train on defendant's road to be carried as a "dead-head" from Pueblo to Coolidge, and was admitted by the conductor as a passenger on this train.

Facts.

The evidence showed that defendant was in the habit of carrying passengers in the caboose usually attached to such freight trains. This freight train was composed of about 46 freight cars with air brake appliances connected with only a small portion of the front cars. On the other cars there were the customary hand-brakes, and there were brakemen for their operation. There was one other passenger in the caboose with the plaintiff. The plaintiff's testimony, in substance, was that, as this train approached the railroad station called Blackwell, the cars whistled the usual signal for approaching a railroad station; whereupon the plaintiff left his seat, and started to the rear door of the caboose, for the purpose of looking out to see the station or town which they were approaching. Just as he had gotten upon his feet, and started towards the door, the car made a sudden and violent stop, which threw him backward, in the direction the car was going, with such violence as to carry him several feet, and falling in the door of the partition separating the front and rear parts of the caboose. The fall was so violent as to dislocate his hip, and cause great, if not permanent injury. The evidence on the part of the defendant tended to show that this accident occurred after the train had gone into the station and stopped, and done some switching, taking on another freight-car, and occurred just as the train started out of the station, and that the sudden jerking resulted from the fact that the brakes were fastened upon the tender; that is, the air in some way, from exclusion by pressure in the cylinder, had fastened the brakes upon the wheels, and the engineer stopped for the purpose of taking them off. The engineer testified that it was necessary to stop suddenly for that purpose. On this latter branch of the case, the court in its charge to the jury instructed that if the injury occurred at this point, and under such circumstances,—that is, if it was necessary, in the judgment of the engineer thus to suddenly stop and unfasten the brakes from the wheels—the plaintiff could not recover.

Counsel for defendant, on the hearing of the motion for a new trial, insist upon two propositions as the basis of its application for rehearing: *First*, that the weight of evidence is so overwhelmingly in favor of the proposition that the injury occurred, not as they approached the station, as claimed by the plaintiff, but just as they were preparing to leave the station, and in the manner testified to on behalf of defendant, that the court ought not to permit the verdict to stand; and, *second*, that the plaintiff's own evidence shows that he was guilty of such contributory negligence on his part that he ought not to recover.

Upon a careful reading of all the testimony, as taken at the trial by the stenographer, I cannot see that the court would have been justified in taking the case from the jury on the first proposition. Certainly, when the plaintiff rested, there was not such evidence of this fact as would have justified its withdrawal from the jury. The general rule of practice is that the court may take the case from the jury at the conclusion of the plaintiff's evidence, when, in its opinion, admitting the evidence to be true, no cause of action is shown; but, when the failure of the plaintiff's case is made to depend upon the defendant's evidence, its credibility, weight, and probative force are questions for the jury. *Woods v. Atlantic Mut. Ins. Co.*, 50 Mo. 115, 116; *Herriman v. Chicago & A. R. Co.*, 27 Mo. App. 443. Where, however, the defendant's evidence is so overwhelming and indisputable in its nature and character as to leave no ground for variant conclusions in the minds of reasonable men, the court may direct the jury to find accordingly. So long, however, as the right of trial by jury exists, suitors are entitled to take the opinion of the jury on disputed facts; for they are the sole judges of the weight of evidence, and the credibility of witnesses. The court responds to the law, and the jury to the facts. The plaintiff is a competent witness under the law. His credibility, and the weight to be attached to his testimony, are essentially questions for the jury. It may be conceded that the evidence on the part of the defendant quite clearly shows that the injury in question occurred after the train had gone into the station of Blackwell; but the plaintiff's evidence just as clearly shows that it occurred before the station was reached, and was the result of the manner of slowing up the train on its approach thereto. And there are some facts and circumstances testified to by the plaintiff, which, if they existed, very strongly corroborate his statement as to the time and place of the accident. He testifies, *inter alia*, that just after he fell he was picked up by the other passenger, and laid upon the seat or bench in the car, and that he lay there some 20 minutes, until they made the second start. He also testified that, while he was so lying prostrate and helpless upon this bench, the cars were doing some switching or making some movements in the switch-yards, and he made these significant statements: "I was lying on the bench, suffering with intense pain. When they hooked on to start off I remarked to the man that picked me up: 'My God, they will kill me yet.' They were then either starting off, or doing something. * * * I know they were jerking things around pretty lively. I could not tell what they were

Place of accident—
Weight of testimony.

doing. I was lying there in such intense pain I could not get up. I know every jerk they gave me there. I was afraid they would jerk the life out of me." This would show that when the movements and violent jerking occurred about the switch-yards, and when the train started off, the plaintiff had received his injury, and was prostrated. The jury, who looked upon and heard the witness, should be allowed to say whether they believe him or not. And this is the whole matter of this issue.

The only remaining question to be considered is as to whether the plaintiff's evidence shows such contributory negligence on his part as to make it the duty of the court to take the case from the jury. I know no sounder or safer rule respecting this much-mooted question of contributory negligence than that announced by courts of the highest character, as follows: "There is no doubt that negligence is in many cases a question of law to be determined from the facts agreed or found by the jury. But where the facts in evidence may, in the judgment of sensible men, lead to very different conclusions, as to whether they establish want of care or contributory negligence, the jury is the tribunal selected to determine the question." *Norton v. Ittner*, 56 Mo. 352; *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.), 657.

The observations of that eminent jurist, Chief Justice COOLEY, in *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 120, are entitled to respect: "When the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would generally be regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing from him as to the ordinary standard of proper care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be a question of law. * * * While there is any uncertainty, it remains a matter of fact for the consideration of the jury. * * * The difficulty in these cases of negligent injuries is that it very seldom happens that injuries are repeated under the same circumstances, and therefore no common standard of conduct by prudent men becomes fixed or known. * *

Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ."

It is insisted that because the plaintiff was upon a freight train that he must take notice of the manner of running and managing such trains; and that he must have known from observation that such trains, on approaching stations, were liable to sudden jerks in the effort to stop them, which rendered it unsafe for one to get upon his feet on approaching a station; and that no one so getting upon his feet, from any cause short of absolute necessity, could recover for being knocked from his feet by the halting of the train, no matter how great the violence of the halt, and no matter how unnecessary its suddenness. Negligence is always a relative question. It is a question of ordinary care. It is the caution and vigilance which reasonable men exercise under like circumstances. *Cayzer v. Taylor*, 10 Gray (Mass.), 280; *Ford v. Fitchburg R. Co.*, 110 Mass. 256; *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo. 202; 18 Am. & Eng. R. Cas. 23. Or, as it is aptly expressed in *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 581, it is "that degree of care which persons of ordinary care and prudence are accustomed to use and employ, under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination." It seems to me as rather extreme doctrine to say that a passenger on a caboose attached to a freight train on its approach to a station, actuated by the natural curiosity to look out to observe the town and surroundings, in the absence of any windows permitting an outlook, would be heedless of his own personal safety simply because he got upon his feet under such circumstances; unless it can be maintained that the habit of such cars on approaching stations was to stop so suddenly and violently as to make it perilous for a passenger to be upon his feet at all at such a time, and that this fact was known to the plaintiff. Although this was a freight train, so long as the defendant admitted passengers upon it there was a mutual obligation imposed upon carrier and passenger. While a passenger entering upon such a vehicle of conveyance was subject to the inconvenience and perils ordinarily incident to the usual manner of handling such trains, yet he had a right to presume that the agents and servants in charge of this train would also perform their duty towards him and the public. "And it is not to be denounced as negligence for him to assume that he is not exposed to a danger which can only come to him through the disregard of duty and law on the part of another. This is just and reasonable." *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 542.

The plaintiff had a right, in his movements in and about that train, to assume that the conductor and engineer and brakemen, knowing that they had on board passengers liable to injury from the manner of running and stopping such a train, would have their apprehension quickened, their vigilance and caution increased, in proportion to the risk to the lives and limbs of its passengers. So that the plaintiff, as he claims, not reasonably anticipating on the sound of the whistle that the train in motion would make a violent lurch or movement backward, started to look out; and, while the law would exact of him an increased degree of care on thus getting to his feet, it seems to me that it is not maintainable, on the now recognized limitation and application of the doctrine of contributory negligence, that it was *per se* negligent for him to get upon his feet; and this, for two reasons: Because the evidence fails to show that such sudden and violent stopping, as occurred in going into the station, was so usual that a passenger, with no more knowledge than the plaintiff had, should be held to reasonably anticipate the shock; and because plaintiff, in rising from his seat, had a right to rely upon the presumption that the engineer would do his duty by stopping his train so as not to produce unusual hazard, either by beginning the effort to slow up further back, or else calling to his aid the hand brakes, which the evidence tends to show was not done in this case. The evidence of the conductor, Smith, tended to show that while he had in his experience witnessed as sudden and violent halt as claimed by the plaintiff, yet it was unusual, and could have been largely prevented, or rendered unnecessary, by gradually letting on the air, and calling to his assistance the hand brakes. As before suggested, when the defendant admitted to passage on this caboose the plaintiff, it took upon itself the obligation which the law imposes upon a carrier of passengers, which is the exercise of "the utmost care and diligence of very cautious persons; and, of course, they are responsible for any, even the slightest, neglect." Story, Bailm. § 601. "For the law will, in tenderness to human life and human limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof." *Id.* § 601a; *McKinney v. Neil*, 1 McLean (C. C.), 540; *Stokes v. Saltonstall*, 13 Pet. (U. S.), 181. In other words, it was bound to the exercise of a higher degree of care and caution, in running and stopping its train, towards a passenger on a freight train than if the cargo consisted of inanimate matter or live stock. So that on approaching a station, knowing, as the engineer did, the composition of his train of 46 cars, with the air brake working upon a few only

of the forward cars, and the others dependent more or less upon the application of the hand brakes, and the liability of such a train in slacking up to shock and disturb the rear-most car in which there were passengers, (although it may be conceded that more or less violence in halting was necessarily incident to the management of such a train,) the engineer was under obligation to use every precaution and means at his command to prevent the unnecessary exposure of the passengers to injury.

Looking at the facts and circumstances attending this injury, it seems to me that it was peculiarly a question of fact for the court to submit to the jury, as it did in its charge, as to whether or not the plaintiff himself in his conduct was heedless or negligent of the law of self-preservation, and unnecessarily exposed himself to a known or apparent danger, or whether or not the engineer and other servants of the defendant exercised the utmost vigilance and care to prevent the unnecessary exposure of its passenger to injury. As said in *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373-387: "The care required is not that care without the exercise of which accidents may happen; as, for example, after a passenger is received on board he would be safer—less liable to accident—if locked up in the car, or chained to one of the seats or other fixture so as to deprive him of locomotion, moving from car to car. This would be the very utmost degree of care and caution; but that is not required, so that the epithet 'utmost' must be taken with some qualification. * * * In *Boyce v. Anderson*, 2 Pet. (U. S.), 150, * * * Chief Justice MARSHALL held that the responsibility of the carrier (in the instance of a loss of negroes in transport by the upsetting of the boat's yawl) should be measured by the law applicable to passengers rather than that applicable to the carriage of common goods, and that the rule of care is that of ordinary care,—the care which all bailees for hire owe their employer."

And this rule in *Stokes v. Saltonstall*, *supra*, was afterwards extended so as to make the carrier liable "if a disaster was occasioned by the least negligence or want of care and prudence on the part of the defendant." The case at bar is distinguishable in its facts from the case in 26 Ill., *supra*, in this: that there the injury occurred by reason of the passenger unnecessarily and carelessly passing to and standing on the platform of the car as it halted, and the violence in movement which resulted therefrom was occasioned by the engineer of the train letting on a large quantity or force of steam, which in his best judgment was necessary to overcome the friction of frogs and switches. In that case it was held that the company would not be liable if in doing so the engineer

exercised a reasonable discretion; and it was in recognition of this rule that Judge HALLETT, in his charge to the jury in this case, directed them that the plaintiff could not recover, if the injury resulted in the act of starting from the station, and in applying such sudden force of steam as in his judgment was necessary to loosen the binding brakes; whereas, the case at bar went to the jury, to ascertain whether or not the defendant in stopping its train on going into the station did it in an unusual, unnecessary, or negligent manner. In my opinion, the peculiar state of proofs respecting this issue well warranted the action of the court in taking thereon the opinion of the triers of the fact.

The motion for a new trial was overruled, and judgment entered on the verdict.

HALLETT, J., concurs.

Contributory Negligence—Passenger in Freight Train Standing Up.—See *Harris v. Hannibal & St. J. R. Co.* (Mo.), 27 Am. & Eng. R. Cas. 216; *Wallace v. Western North Carolina R. Co.* (N. Car.), 34 *Id.* 553, 37 *Id.* 159; *Smith v. Richmond & D. R. Co.* (N. Car.), 34 *Id.* 557.

GULF, COLORADO & SANTA FE R. CO.

v.

CAMPBELL.

(*Texas Supreme Court, January 21, 1890.*)

Freight Train—Person Travelling on Against Rules and Conductor's Orders.—If a person is informed by the conductor that the company's rules prohibit passengers from travelling upon freight trains, and such person nevertheless enters the train, he is not a passenger and cannot recover for injuries sustained, although a brakeman may have told him to get on the train subsequently to the refusal of the conductor to carry him.

Personal Injuries—Damages—Physician's Services.—In an action for personal injuries, the plaintiff can only recover the reasonable value of his physician's services, and not the amount of the bill made out by him and based upon the possibilities of a prospective law suit.

APPEAL from District Court, Washington County.

J. W. Terry for appellant.

HOBBY, J.—This is a suit by the appellee, Campbell, who was plaintiff below, for damages for personal injuries received in a collision between two portions of a freight train, in the city of Brenham, upon which he alleged he had taken passage for the purpose of going to Kin-

Facts.

ney. He testified that he was in Brenham on the night of the 30th of March, 1887, and expected to return to his home at or near Kinney. He had ridden on freight trains on several occasions to and from Brenham and Kinney. The freight train pulled into the depot at Brenham on the way to Kinney. He asked a man standing on the platform, with a lantern in his hand, if he had charge of the train, who answered affirmatively, and gave him permission to get on. Plaintiff took a seat in the caboose, and expected, and was prepared to pay his fare. In a few moments the engine began to back the car. Plaintiff rose from his seat, and started to the door of the caboose, to ascertain the cause of the backing, when the collision occurred, and he was thrown out on the ground, and bruised. He did not recollect exactly how he was hurled out of the car. His coat caught on to the brake at the end of the caboose. There was testimony that some freight trains carried passengers and others did not.

Martin, the engineer who was in charge of the train, testified that after the train arrived at Brenham he cut the engine loose from the main train, and attached the caboose to it, and pulled to the tank for water. While there plaintiff insisted on riding to Kinney, and got on the engine. After telling him he could not three times, he got off, and he saw no more of plaintiff until he commenced backing down towards the north end of the switch, when he saw the plaintiff standing on the platform of the caboose nearest the engine. Could see him distinctly, as the headlight shone directly in his face. Witness stopped the engine and caboose, waiting for orders from conductor, and while so waiting a portion of the main train of cars broke loose, and ran down with considerable force, struck the caboose, and drove it up on the pilot of the engine, and threw plaintiff from the platform. When witness saw the situation, he reversed his engine so as to give plaintiff a chance to jump off. The cars would not have broken loose and run back had the brakes been set on them. It was negligence not to have them set. Plaintiff was inside of the caboose. The train was not allowed to carry passengers. There was proof that he had stated to several persons, a few days after the injury, that he "got full while at Brenham. Was left by the passenger train. Tried to come home on a freight. Was put off by the engineer. Then went to the conductor, who refused to let him ride. Afterwards he met a man on the platform with a lantern, who told him to get on the train. He got on the rear end of the caboose, and could have jumped off, but he remained standing, and got hurt."

Engineer's
testimony.

The conductor testified that plaintiff asked him to let him

ride on the train to Kinney. He told him he could not ride on the train, as he had no authority to do so, and **Conductor's testimony.** would not carry passengers. He gave no one permission to ride on the train. The brakeman had no authority to allow any one to ride. Both doors of the caboose were locked. Two brakemen were inside, both of whom had lanterns. There were 14 cars in the collision. The brakeman on the north end of the cars failed to set the brakes, and this caused the collision." Plaintiff denied telling any one that he was on the platform of the caboose at the time of the accident. It was admitted that the conductor and brakeman were discharged on account of the accident. The jury returned a verdict for \$150 actual and \$350 punitive damages. No exemplary damages were claimed in the petition, and judgment was rendered for the former, the latter having been remitted. The case is before us on appeal, but there is no appearance for appellee.

The refusal of the court below to give the following charges requested, is assigned as error: "(1) If you believe from the evidence that the freight train in question was prohibited from carrying passengers, and that when **Instructions requested and refused.** plaintiff applied to the conductor for passage on said train he was informed by the conductor that he could not ride on that train, then you will find for the defendant, although you may believe that a brakeman or some other person afterwards told the plaintiff to get on the train. (2) If you believe from the evidence that by the rules of the company passengers were forbidden to be carried on the train in question, then the presumption is that the plaintiff was an intruder, and without lawful right to be there. This presumption may be rebutted by the plaintiff, showing that while the rules forbid the transportation of passengers upon such trains, yet with knowledge of the company, and without objection on its part, they are habitually permitted to take passage on such trains. The company, through its proper officers, having the right to make these rules, may, through the same officers, relax or dispense with them, and the public are authorized to consider them dispensed with when not practically enforced. The conductor cannot relax these regulations without the consent of the company, because he is the agent whose special duty it is to see that they are enforced, and any relaxation of the rules on his part would be a disobedience of the orders of his superiors. There is no proof of gross negligence in this case, and hence if you find that, as defined in the charge, the plaintiff was not a lawful passenger on the car, you will find for defendant.

These instructions are in the language of our supreme court

in the case of *Prince v. International & G. N. R. Co.*, 64 Tex. 146, 21 Am. & Eng. R. Cas. 152. The jury were instructed that, if the plaintiff entered the caboose by the invitation, knowledge and consent of the conductor, he was a lawful passenger, and was entitled to all the rights, etc., of such passenger on a regular passenger train; and, if he received the injuries through the carelessness and negligence of the defendant, he was entitled to a verdict. But if they believe the caboose was not in the habit of carrying passengers, and plaintiff entered it without the knowledge and consent of the conductor, he was guilty of contributory negligence, and could not recover unless the company was guilty of gross negligence. We do not understand this to be the law applicable to the facts in this case. If the conductor told the plaintiff that he was not authorized or permitted to carry passengers, and still he entered the car with the knowledge and consent of the conductor, he would not, under the authority of *Houston & G. N. R. Co. v. Moore*, 49 Tex. 31, and *Prince v. International & G. N. R. Co.*, *supra*, have been a lawful passenger thereon; because, from the evidence in the case, he must have known the fact that the conductor possessed no authority to permit him to ride, and that it was in violation of the rules of the company if he became a passenger on the train. This is not denied by the plaintiff's evidence. It is quite plain that he knew, or certainly had reason to suppose, that the "man on the platform with a lantern in his hand" was violating the order of the defendant, even if he was one of defendant's employes, and gave him permission to ride. It does not appear from the plaintiff's evidence that the person giving him permission to ride in the caboose was authorized so to do; and it does appear from the evidence that the plaintiff was informed by the conductor that he could not carry passengers on that train. A case, then, is presented in which the plaintiff is injured while unlawfully upon defendant's car, and, according to his evidence, the injury would not have occurred but for his own negligence. We think, under the rules laid down in the cases cited, a charge embodying the principles contained in the instructions requested should have been given.

The fifth assignment of error is that the court erred in admitting, over the defendant's objection, the evidence of Dr. McGregor relative to his medical bill of \$100; it appearing from said evidence that his said medical bill was based upon a prospective lawsuit, and not for services actually rendered. Dr. McGregor, on direct examination testified: "My bill was

Travelling in
caboose
against con-
ductor's or-
ders.

Damages—
Bill for medi-
cal attend-
ance.

one hundred dollars and has not been paid. I believe the bill under the circumstances was a reasonable one. I have charged Campbell with it, and expect him to pay me if he can but get anything in this suit." On cross-examination he testified: "Visited plaintiff four or five times, at a distance of three miles. According to my schedule, the ordinary price for a visit to Mr. Campbell would be \$3, which for five visits would amount to \$15. I prescribed for him five times. Charge for each prescription, \$1.50, which for five prescriptions would amount to \$7.50, making a total of \$22.50. My charge of one hundred dollars was based on a prospective lawsuit. The reason I charge more in cases of gunshot wounds, cuts, and railroad accidents is that, as attending physician, I always have to testify as an expert as to injuries and their possible consequences. This entails a great deal of work I would not have to do in ordinary cases." Whereupon the defendant objected to the evidence relating to the medical bill of \$100, and asked that it be excluded, on the ground that the same was incompetent and inadmissible,—it appearing from the witness' own testimony that his bill was based upon a prospective lawsuit, and not for services actually rendered to the plaintiff; which request was by the court refused. The court, in its charge, did not exclude from the consideration of the jury so much of the bill as was based on a prospective lawsuit. If the plaintiff was entitled to any damages under the facts of this case,—a question we are not called upon to decide,—he was entitled, as a part thereof, to recover the reasonable value of medical services rendered him in effecting a cure; but he was not entitled to recover the value of his services as a witness in the case. For the errors mentioned we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J.—Report of commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

ADAMS

v.

MISSOURI PACIFIC R. CO.

(Missouri Supreme Court, December 21, 1889.)

Passenger on Freight Train—Alighting—Failure to Stop at Station.—A passenger on a freight train, aged 67, and in good health, was informed by the conductor that he did not propose stopping at the station and was directed to get off about a quarter of a mile from it. There was a barbed wired fence on each side of the railway, and he immediately started forward alongside the train upon the only route apparently open to him. Upon reaching a bridge, he found that the only possible manner of proceeding was by getting on the top of a flat car on the bridge in the same manner as the conductor and a passenger had previously done. He mounted the car and passed on it safely over the bridge to the front end of the car. He examined the ground before he got down, and got upon the coupling between the cars. In springing to the ground his leg was broken. The evidence showed that plaintiff hurried his movements because of fear that the train should start. *Held*, that he had no cause of action. **BRACE** and **BLACK, JJ.**, dissenting.

APPEAL from Circuit Court, Cass County :

T. J. Portis and *Adams & Bowles* for appellant.

Railey & Burney, for respondent.

BRACE, J.—This is an action for personal injuries, in which the plaintiff recovered judgment in the circuit court for \$10,000 damages, from which the defendant appeals.

At the time of the injury the defendant was carrying passengers on all its freight trains. The plaintiff, by profession, a minister of the gospel, aged about 67 years, in good health, earning about \$700 per annum in his profession, took passage on one of defendant's freight trains at Archie, a station, for Harrisonville, another station, on defendant's road, paying the usual fare to the conductor, and informing him of his place of destination. When the caboose in which plaintiff was riding, and which was at the rear end of the train, arrived at a point about one-quarter of a mile from the depot at Harrisonville, at which passengers were usually landed, the conductor came to him, and said : " You will have to get off here. I am not going to stop when I start. I will not stop at the depot. I shall go on as fast as I can ;" and, leaving him, went forward on the flat-cars loaded with coal in the train, towards the engine and the depot. The plaintiff seeing no other employes of the road about, and being unacquainted with " the ground around there," got off the caboose

Facts.

at the rear end thereof, and discovered that the train was stopping on a "fill," and that the roadway on each side was fenced with a barbed-wire fence of five strands. His business being urgent, he started on the roadbed alongside the train, towards the front, to make his way up to the depot. He had proceeded in his course but a short distance (three or four car-lengths from the caboose), when he came to a bridge across a water-way, provided for through the fill in the ravine. The bridge resting on two perpendicular stone abutments, about 15 feet high, the whole space of the bridge occupied by one of the flat-cars in the train, loaded with coal, and the space between the bridge and the barbed-wire fence running parallel with the road, closed by a similar fence running from the one to the other, his further progress in the direction of the depot was thus completely blocked, except by way of the coal-car over the bridge. His subsequent movements appear from the following extracts from his evidence given on the trial: "*Question.* Now state to the jury why you didn't go on to the depot. *Answer.* There was a barbed-wire fence right before me, and one at my right side, and I could not get out. There was a young man on the other side of the train. It was Mr. Kerens, and he was a little more active than I was, and got up on one of the flat-cars, and I got up on that flat-car, and walked the length of it, until we passed over the culvert, and then I swung off, and tried to get down as cautiously and prudently as I could. The train was standing still at that time. In getting off I was probably considerably excited for fear the train would start. I was a long ways from the engine, and I didn't know when the engine would start. I hurried to get off, and when alighting I fell over, so that I think my foot struck the end of one of the ties, and snapped the leg right there. *Q.* State to the jury if it was hurt as you got off the train. *A.* I hadn't made a motion with the other foot until I felt my leg give way. *Q.* State to the jury what was the condition of your eyesight at that time. *A.* My sight is not as good as it was some years ago. I examined the ground before I got down; I thought I could make it. *Q.* State to the jury what was the condition of the ground there, so far as you could see. *A.* The ground was quite descending. It was rather steep. It was lower from the side track out to where the grade commenced. I thought it was pretty level where I looked and where I was stepping. I looked as well as I could, hurriedly. I saw no reason why I could not make it safely. Near the ties, if I remember rightly, it was level—that is my recollection of it—and it descended rapidly a few feet further. *On Cross-Examination.* *Q.* Describe the manner in which you got off the

car. *A.* Well, I remember of holding to the car in front of me with one hand. I was considerably exercised, for fear that they would start. I was hurrying, and using all the care and caution that I could. I remember of putting my hand on the car in front of me, but whether I had hold of anything with my right hand I could not say. I was between the freight-cars, and had hold of the one in front of me with my left hand. I do not know what I had hold of with my right hand. I do not know that I could have reached anything. *Q.* Then you put your hand on the car and sprang to the ground? *A.* Well, yes, sir; I sprang as far as I thought necessary—was as careful as I could be. *Q.* Do you know the height of those cars? *A.* No, sir; I do not. *Q.* Can you approximate it? *A.* It would be guess-work. I should think from three to four feet; I was on the coupling between the cars. *Q.* The train was still there when they took you away? *A.* Yes, sir. *Q.* When you called to Mr. Kerens to get assistance, he was off the train, was he not? *A.* Yes, sir. *Q.* He had gotten off on the ground? *A.* Yes, sir; I think it was from the flat-car ahead of me." The fracture was an oblique one of both bones of plaintiff's left leg. The external bone was fractured into the ankle joint; the internal bone was fractured higher up. The plaintiff, after the injury, received prompt surgical attention, was confined to his bed about ten days, and his leg kept bandaged for about two months, and then he began gradually to regain the use of it, with the assistance of crutches. The defendant offered no evidence, but at the close of plaintiff's evidence asked, and the court refused, an instruction in the nature of a demurrer to the evidence of the plaintiff, and thereupon the case was submitted to the jury under instructions asked for by the plaintiff, and a verdict returned in his favor for the amount for which judgment was rendered. It is urged, as ground for reversal, that the court erred in refusing to sustain defendant's demurrer to the evidence, and in refusing a new trial for excessive damages.

1. There is nothing in the evidence tending to show the existence of any rule, regulation, or custom on defendant's road in discharging passengers from its freight trains different from that applicable to passengers upon its regular passenger trains, and the plaintiff having been received by the defendant as a passenger upon its freight train, into a car appropriated to the purpose of carrying passengers, it incurred the duty of transporting him in safety, so far as his safety could be secured by the exercise of the highest degree of care attainable by the most prudent persons engaged in the business of a com.

Discharge of
passengers
from freight
trains.

mon carrier of passengers for hire, to the place where its passengers were usually received and discharged in the course of its business, at the station of his destination, where it is to be presumed the defendant had provided suitable conveniences for passengers to alight from its trains, and thence to depart from its premises and go their own way. The defendant's conductor, in requiring the plaintiff to get off its train at a distance from the station to which he had paid his fare, was guilty of a breach of this duty. The plaintiff in obeying his orders, and getting off the train at the place where he was directed to do so, was obeying the orders of defendant. When he landed safely on defendant's roadbed, beside the caboose, he was still a passenger of the defendant, to whom it owed, not only the duty of transporting him on its train to its station at Harrisonville,—a duty which it had refused, was then refusing, and continued to refuse to perform, up to and including the moment in which the plaintiff was injured,—but to whom the defendant also owed the further duty of providing for him a convenient and safe way by which he might leave defendant's train, its right of way and premises, and go about his own business. The duties that impelled the plaintiff to take passage on defendant's train were demanding his presence at the point of his destination. Thus far he had done all he could to meet the requirements of his sense of those duties, but now he was about to fail, and must fail, to meet the requirements of those personal duties, unless he takes up the discharge of defendant's duty, thus unexpectedly and against his will thrust upon him, of finding a way and transporting himself to the station. To do this on foot, and by the way that seemed to him most practicable, was the only course left open to him. To this course he was constrained by defendant's neglect of duty. That duty attended him, however, and every step taken by him in the effort to reach the station was the direct effect of defendant's neglect of duty towards him. That the plaintiff, when he was wrongfully set afoot at a distance from, would seek to reach, the station, with ordinary care and caution, by the most practicable route, was to be expected, and ought to have been foreseen by defendant's servants. If there was danger in that way, such danger ought to have been foreseen, and that he was liable to encounter it. If in such encounter he was injured, such injury was the proximate, because the natural, although not the necessary or inevitable, result of the defendant's negligence, and for it the defendant ought to be held responsible. *Miller v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 389, 29 Am. & Eng. R. Cas. 254.

Putting one's self, then, in the place of the plaintiff, when

and where he was set afoot beside the defendant's caboose, ignorant of the topography of the country, and of the obstacles in his way, and uninformed as to when the train would move, what would be expected of an ordinarily prudent man, in his effort to reach the station as expeditiously as he had hoped to reach it, when he intrusted himself to the defendant's care? He must go forward. He could not expect to reach it by turning back upon the track he had just passed over. A barbed wire fence on each side forbade an attempt to leave the roadway either to the right or left, to seek some other feasible route to the station; and he immediately starts forward, alongside the train, upon the only route apparently open to him. He has proceeded but a short distance, when he discovers that his further progress in that direction is effectually barred, except by way of the top of the flat-car resting on the bridge. The conductor, when he parted from the plaintiff after ordering him to disembark, had passed forward on similar cars, similarly loaded, and presumably on this car over the bridge. Another passenger who had taken passage with him at the same time and place, and who was proceeding in the same direction, on the other side of the train, mounted the car, and was passing over the bridge. He followed his example, mounted the car, passed on it safely over the bridge, and to the front end of the car. He examined the ground before he got down. Saw no reason why he could not make it safely. Got upon the coupling between the cars, which brought him as near the ground as possible, and, with one or both hands on the cars, swung down, springing out from the train as far as was necessary to clear its pass way should it start, of which he was fearful, and alighted upon the ground, and in so doing his leg was broken, the train all the while standing still.

Contributory
negligence.

We fail to discover, in the course of his whole progress, a single movement that might not have been reasonably expected of an ordinarily prudent man, seeking to make his way expeditiously to the station from the point where the defendant had placed him. He followed the only way the defendant had left open to him to pursue his journey. It had caused him to alight from its train at an unsuitable and dangerous place, distant from the place of his destination. Its neglect of duty was continuous from that time up to and inclusive of the moment in which he was injured, and because of that neglect, and not by reason of any act of his own volition, he was compelled to resort to the car to cross the bridge, and to leave the car after the bridge was crossed. In so doing he was injured. The neglect of duty and the injury were not only contemporaneous and coincident, but the latter

was the direct and immediate result of the former, so far as a physical effect can be the direct result of a moral cause. There ought to be no difficulty in distinguishing such a case from those in which a purely voluntary action intervenes between an injury and a completed act of neglect, but for which such voluntary action might not have been taken, or from those other cases in which the passenger has been guilty of recklessness or want of ordinary care in endeavoring to extricate himself from a situation in which he has been placed by the neglect of the carrier. The rule that ought to obtain in this case is well stated by THOMPSON, J., in *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. at page 106: "If a railway carrier, instead of discharging his passenger at the place of destination called for by the contract of carriage, lands him at another place, from which he cannot reach the place of destination by any practicable route without encountering a serious danger, and the passenger immediately thereafter, proceeding by the only practicable route to the place of destination without fault or negligence on his part, encounters such danger, and is hurt, we have no difficulty in saying that the hurt is a proximate consequence of the wrong done by the carrier. A prudent carrier would foresee such danger to the passenger, and should, we think, be held bound to foresee it, and answer the consequences of it." See, also, *New York, C. & St. L. R. Co. v. Doane*, 115 Ind. 435; 37 Am. & Eng. R. Cas. 87, and cases cited in 17 N. E. Rep., note on page 914. And in this case we have no difficulty in saying that the plaintiff's injury was the proximate result of defendant's neglect, and that no negligence of the plaintiff contributed to that injury. There was no error, therefore, in the action of the court in overruling defendant's demurrer to the evidence. On the evidence the plaintiff ought to have had a verdict and judgment for a reasonable amount as damages for his injury.

2. The amount of damages in cases of this kind must be left largely to the discretion of the jury, and their verdict

Damages—Ex-
cessive ver-
dict.

ought not to be disturbed unless the amount is so gross as to shock the sense of justice of the judicial mind, and satisfy it that such verdict must have been the result of passion, prejudice, or partiality. In view of the age of the plaintiff, his income, the physical demands of the profession in which he earned it; that the pain he suffered seems not to have been different or greater than that usually suffered by persons of his age from a broken limb; that the cost of surgical attendance could not have been large; that he was confined to his bed but a few days, and that within two months after the injury he was able to dispense with bandages, and gradually, with the assistance of

crutches, resume the use of his leg, with care; and since has suffered, and in the future will in all probability continue to suffer, only such pain and inconvenience as usually results to one of his age from a limb that has been broken, and will not be prevented from following his usual vocation, and earning as much money therein as he did before,—we find it impossible to reconcile a verdict of \$10,000 for his injuries with our sense of justice, and must conclude that this verdict was the fruit of either prejudice or partiality, and that the amount of plaintiff's damages ought to be submitted to another jury. The judgment of the circuit court ought, therefore, to be reversed, and the cause remanded for new trial.

In the foregoing views BLACK, J., concurs: but RAY, C. J., and SHERWOOD and BARCLAY, JJ., being of the opinion that plaintiff's evidence failed to show facts sufficient to constitute a cause of action against the defendant, the judgment will simply be reversed.

Freight Trains—Passengers Alighting at Place Other Than Station.—See *Smith v. Central R. & B. Co.*, (Ga.) 34 Am. & Eng. R. Cas. 456; *New York, C. & St. L. R. Co. v. Doane*, (Ind.) 37 *Id.* 87; *White Water Val. R. Co. v. Butler*, (Ind.) 34 *Id.* 467; *McGee v. Missouri Pac. R. Co.*, (Mo.) 31 *Id.* 1, note 9.

BOYCE

v.

MANHATTAN R. CO.

(*New York Court of Appeals, Second Division, January 14, 1890.*)

Elevated Railroad—Station—Unguarded Hole.—The platform of a station on an elevated railroad was built on a curve, and each car as it stopped there touched the curve at a tangent so that the middle part was within one or two inches of the platform, while the ends were about fourteen inches therefrom. Plaintiff, a passenger upon one of the trains, attempted to leave the train at the station. She was not familiar with the locality, never having landed there before, and the space between the steps of the car and the platform was open and unguarded. No warning or assistance was given by the persons in charge of the train. Plaintiff in attempting to cross, stepped into the open space and was severely injured. There was evidence tending to show that it was so dark that the hole could not be seen. *Held*, that the evidence was sufficient to send the case to the jury.

APPEAL from General Term of the Superior Court of New York City. See 54 N. Y. Super Ct., 286.

Samuel Blythe Rogers for appellant.

T. Henry Dewey for respondent.

VANN, J.—The defendant, as a carrier of passengers, operates a line of elevated railway extending from Harlem, to South Ferry, in the city of New York. The east platform of the South Ferry station is built on a curve, and each car, as it stops there, touches the curve at a tangent, so that the middle part is within one or two inches of the platform, while the ends are about fourteen inches therefrom. The result of this is an open space, between the steps of the car and the platform of the station, several feet long and fourteen inches wide. On the 25th of January, 1885, the plaintiff was a passenger upon a train of the defendant which reached South Ferry at about half-past 6 in the evening. Accompanied by three friends, she left the car, and attempted to reach the platform of the station. She was not familiar with the locality, having never landed there before, and the space between the steps of the car and said platform was open and unguarded. Nothing was put across the hole for passengers to step on as they alighted, and no warning or assistance was given by the persons in charge of the train. If the passengers saw the hole, they could step across it, but unless they saw it there was nothing to prevent them from stepping into it. As the jury is presumed to have found, upon sufficient evidence, there was but a single light from one end of the station to the other, and that was at a point quite remote from the open space in question. While some light came through the car windows, it did not reach the hole, which was in the shadow of the end and lower part of the cars. The plaintiff was the third in the little procession of four as it approached this spot. Her brother, who was in advance, stepped off first, and just reached the edge of the platform of the station with the tip of his right foot, and was forced to make a quick step with his left foot in order to save himself from falling into the open space. As he turned to give warning to the others, he was pushed forward by his younger sister Rhoda, who closely followed him, and whose dress covered the hole so that it could not be seen. When the plaintiff, who was just behind her sister, attempted to cross, she stepped into the open space, fell through the hole, and was severely injured. There was evidence tending to show that it was so dark that the hole could not be seen.

It is not essential to inquire why the railroad was constructed with so sharp a curve at the place where the accident occurred, nor whether the defendant is responsible for the way that the South Ferry station was built. By stopping its trains at the point in question, it invited the passengers to alight, and was thereby charged with the duty of using due care to pro-

Negligence-
Question for
jury.

vide proper and safe means of getting from the platform of the cars to the platform of the station. Even if the open space was necessary, owing to the peculiarities of the location, it was not necessary to leave it unguarded or unlighted. Some precaution, adapted to the situation could have been used, such as throwing a plank across, or stationing a trainman to warn and assist passengers in alighting. At least, the unguarded hole could have been well lighted, so as to be easily seen, and the passengers thus enabled to avoid the danger. We think that the evidence required the submission of the case to the jury for them to determine whether, under all the circumstances the defendant was guilty of negligence that caused the injuries sustained by the plaintiff. *Smith v. New York & H. R. Co.*, 19 N. Y. 127; *Hulbert v. New York C. R. Co.* 40 N. Y. 145; *Sexton v. Zett*, 44 N. Y. 430; *Weston v. New York E. R. Co.*, 73 N. Y. 595; *Hoffman v. New York C. & H. R. R. Co.* 75 N. Y. 605; *Dobiecki v. Sharp*, 88 N. Y. 203, 8 Am. & Eng. R. Cas. 485. The statement of facts already made is a sufficient answer to the claim of the defendant that the plaintiff was guilty of contributory negligence, as matter of law, and that no question in that regard was presented for the consideration of the jury. In the cases cited in support of this position the person injured knew, or should have known, of the danger to be encountered, and hence was required to give general evidence that he exercised proper care; but in this case the plaintiff was ignorant of any circumstance requiring the use of special care, and hence was relieved of the necessity of showing that she used special care. While the actual situation was dangerous, the apparent situation was free from danger. With her limited knowledge of the facts, what should she have done that she did not do? Ordinarily, what everybody does is all that anybody need do. Unconscious of danger, she did what the other passengers did. If she had known of the hole, or if it had been light enough for her to see it by the exercise of ordinary care, a different question would have been presented. Under the circumstances which she had the right to assume existed, she was under no obligation, as matter of law, to look before she put her foot down; but it was a question of fact for the jury to decide, not only whether she should have been more vigilant, but also whether, if she had looked, she could have seen the hole in the surrounding darkness. *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *Morrison v. New York Cent. R. Co.*, 63 N. Y. 643; *Taber v. Delaware L. & W. R. Co.*, 71 N. Y. 489; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622. The circumstances did not require that freedom from contributory neg-

ligence should be shown by direct testimony, but they permitted the inference to be drawn from the general tendency of all the evidence in favor of the plaintiff. *Id.* As no other question has been presented for consideration, we think that the judgment should be affirmed. All concur.

WATSON

v.

ST. PAUL CITY RY. CO.

(*Minnesota Supreme Court, November 18, 1889.*)

Struck Jury—Peremptory Challenges.—Under the statute in relation to struck juries, no peremptory challenges are allowed to any of the jurors composing the panel as finally made up.

Street Railway Company—Duty as Common Carrier of Passengers.—An instruction to the jury that a street railway company, as respects precautions for the safety of passengers, is bound to exercise the greatest care and foresight in the construction and operation of a cable line, *held* to state the correct rule.

Evidence—Impeaching Credibility of Witness—Competency of Evidence.—Contradictory extrajudicial statements cannot be introduced in evidence for the purpose of impeachment until the foundation is laid by the proper preliminary inquiries of the witness whose credibility is questioned.

New Trial—Improper Remarks of Counsel—Discretion of Court.—Whether improper remarks in the presence of the jury are such as are calculated to prejudice the case, is to be determined, ordinarily, by the trial court; and an order granting or refusing a new trial for such cause will not be disturbed on appeal, except in case of clear abuse of discretion.

APPEAL from Circuit Court, Ramsey County.

Action by George H. Watson to recover damages for personal injuries sustained by plaintiff whilst a passenger on one of defendant's cars. The railroad upon which the plaintiff was travelling is operated by cable, and the negligence charged consisted in employing unskilled servants and in failing to provide proper machinery and appliances whereby the train on which plaintiff was travelling became unmanageable whilst descending a steep hill and ran down it with great speed, and the car in which plaintiff was travelling was thrown from the track. The jury returned a verdict for the plaintiff, and a motion by the defendant for a new trial was refused. The defendant appeals.

H. F. Horn for appellant.

C. D. & T. D. O'Brien for respondent.

VANDEBURGH, J.—I. A struck jury was summoned in this

case, and upon the trial, the requisite number not appearing, the sheriff was ordered to summon a sufficient number of talesmen to complete the panel. The court refused to allow any peremptory challenges to any of the jurors on the ground that such challenges are not allowed or contemplated by the statute providing for such juries. We think the court ruled correctly. The provision for striking takes the place of the right to peremptory challenges. 1 Thomp. Trials, § 43; *Blanchard v. Brown*, 1 Wall. Jr. (U. S.), 309; *Branch v. Dawson*, 36 Minn. 194. Our statute (Gen. St. 1878, chap. 71, § 15) is copied from that of Ohio (Laws 1853), except that in the original act there is no provision for calling in talesmen. It is held there that the panel must be made up of the struck jurors, and if 12 do not appear, or are not brought in, the places of absentees cannot be filled by talesmen, and that there cannot be a struck jury, under the statute, unless made up of the number originally selected. *Cleveland, P. & A. R. Co. v. Stanley*, 7 Ohio St. 156. But, under the added provision for talesmen in the statute, as adopted by the legislature in our state, talesmen may be summoned if a sufficient number of the struck jurors do not appear; and the jury still retains its distinctive character as a struck jury under the statute, in which it is clear that no provision was made for peremptory challenges, and no such challenges were contemplated. The procedure, in its essential features, resembles that for the selection of jurors in the justice's court. Gen. St. chap. 65, § 58. We see no reason why the court might not, on the application of either party, compel the appearance of struck jurors who absent themselves, so that in practice talesmen may be avoided, or, at least, a disproportionate number of them need not necessarily be called, unless the parties consent. But, if peremptory challenges are to be allowed in such cases, then each party may exercise the full number allowed in civil actions, though there be but a single vacancy to be filled. It is very clear, we think, that such challenges are not admissible in the case of struck juries.

Struck jury—
Peremptory
challenges.

2. The modification of defendant's tenth instruction was correct. The proposition of counsel was: "The law does not require that such additional precautions as it is apparent after the accident might have prevented the same should have been previously adopted, but only such as would be dictated by the care and prudence of a cautious and careful person before the accident, and without knowledge that it was about to occur." The modification made was in respect to the degree of care requisite, and as to such precautions the court substituted for the last part

Duty of car-
rier.

of the request the words "unless they are of such a character as should have been contemplated in the exercise of the greatest care and foresight." The defendant is a carrier of passengers, and, as respects the construction and condition of its track and roadbed, as well as its cars and their management, the extreme rule as stated by the court is applicable generally, as in the case of other carriers. *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 16 Am. & Eng. R. Cas. 310.

3. The offer of testimony to discredit the witness Byrne was properly ruled out. It was proposed to contradict his statements, without first having called his attention to the time, place, or other material circumstance involved in the supposed contradiction. The proper foundation was not laid, and the court followed the rule as recognized and adopted in this state. *Horton v. Chadborn*, 31 Minn. 322.

**Impeaching
credibility of
witness.**

4. The remarks of counsel for the plaintiff in respect to the character of the defense and the usual verdicts in this class of cases did not constitute "misconduct," such as to justify this court in reversing the decision of the trial court on the question. It was in the discretion of that court to determine upon its own observation and judgment the effect of such remarks upon the jury, and whether they were prejudicial to the defendant. *Loucks v. Chicago, M. & St. P. R. Co.*, 31 Minn. 535, 19 Am. & Eng. R. Cas. 305; *Com. v. White*, 148 Mass. 430. The damages were not excessive, in the opinion of the trial court, and upon that matter we can discover no ground for interfering with its decision.

**Misconduct of
counsel.**

Order affirmed.

Degree of Care Required of Street Railway Companies as Carriers of Passengers.—See *Citizens' St. R. Co. v. Twiname*, (Ind.) 30 Am & Eng. R. Cas. 616; *Topeka City R. Co. v. Higg*, (Kan.) 34 *Id.* 529; *Dahlberg v. Minneapolis St. R. Co.*, (Minn.) 18 *Id.* 202; *Smith v. St. Paul City R. Co.*, (Minn.) 16 *Id.* 310; *Dougherty v. Missouri R. Co.*, (Mo.) 21 *Id.* 497; 34 *Id.* 488.

WEBER

v.

KANSAS CITY CABLE R. CO.

(Missouri Supreme Court, January 27, 1890.)

Cable Railway—Excessive Speed—Injuries to Passenger—Negligence.—Where a passenger upon a cable car was injured in getting off the car while it was moving, by being run over by a car passing on another track, evidence that the rate of speed exceeded that prescribed by the city ordinances and that the bell on the approaching car was not rung, is sufficient to establish negligence on the part of the defendant.

Same—Contributory Negligence—Alighting from Moving Car.—A passenger on a cable car pulled the cord for the purpose of signaling the car to stop. The signal was out of order and did not work. The passenger went to the rear end of the car and jumped from it while it was moving at a rate of slightly over seven miles an hour. Immediately upon alighting, he was struck and run over by a car upon the other track. *Held*, that the evidence showed that he was guilty of contributory negligence.

Demurrer to Evidence—Waiver.—A defendant who demurs at the close of the plaintiff's evidence does not waive the demurrer by putting in his own evidence if the demurrer is again insisted on at the close of all the evidence.

APPEAL from Circuit Court, Clay County.

Johnson & Lucas for appellant.

Wash Adams for respondent.

BLACK, J.—The plaintiff recovered a verdict for \$13,200, and, on the suggestion of the trial court, remitted a part, and accepted a judgment for \$10,000, to reverse which the defendant appealed. The defendant, at the close of the plaintiff's evidence, submitted a demurrer to the evidence, and asked a like instruction at the close of all the evidence, both of which were refused. These instructions present the question whether the court should have taken the case from the jury. The facts disclosed by the plaintiff's evidence are, in substance, these: The defendant's road runs east and west through the city of Kansas. The cars run east on the south, and west on the north track; and when the trains pass there is a space of not more than 18 inches between the cars. The cars going east stopped only at the east, and those going west at the west, sidewalk crossings; and then only when persons desired to get on or off. The plaintiff, a young man, about 20 years old, boarded an east-bound train, composed of a coach and grip-car, intending to go to Holmes

Facts.

street. He took a seat on the north side of the grip-car, near the rear end. Besides end doors, this car had two side doors at the rear end,—one opening out on the north, and the other on the south side. These doors were open, and there was no gate or other contrivance to prevent persons from going out on the north side. Plaintiff testified that when he reached Holmes street he pulled a cord, which was attached to an air-whistle, twice; that he heard no signal, and the cars did not stop; that he was looking out of the side windows of the car, and then leaned over and looked out of the front end car-door, and did not see any train coming from the east on the north track; that he then got up, went to the rear end of the car, and then stepped out of the north door, and, just as he got upon the ground, a train going west, on the north track, hit him, and knocked him down. His legs were thrown under the wheels of the cars upon which he had been riding. The bones were broken, but amputation was not necessary. He is a cripple for life. He stepped off at or within a few feet of the east crossing. He says the train going west was so close to him when he got off that he could not see it. The whistle attached to the cord was in the grip-car, and was out of order, so that it gave no signal. The plaintiff's seat in the car was within six or eight feet of the gripman, and the plaintiff did not notify the conductor or gripman where he desired to leave the car. He had been in the habit of going back and forth, to and from his work, by way of the defendant's road, and was familiar with the running of the cars. There were 8 trains on the road, and each made 10 or 12 daily trips. These trains were running at the rate of a fraction over seven miles per hour, in violation of a city ordinance which limits the rate of speed to six miles per hour.

The evidence tends to show that it was the custom to ring the bells on both trains when and wherever they passed. The gripman of the train on which plaintiff took passage testified in positive terms that the bells on both trains were ringing at and before plaintiff stepped off; but the plaintiff testified, in answer to the question whether he heard any bells: "I don't remember of one on the car I was on. I never heard the bell on the approaching car." Another witness for the plaintiff, being asked if he was accustomed to hear signals, said: "Yes, sir. On that occasion I cannot say whether I noticed any." The defendant offered evidence to the effect that there were notices in the cars warning persons not to get off while the cars were in motion. The defendant offered other evidence; but, as it does not aid the plaintiff's case, it need not be recited.

The defendant, in running its trains at a rate of speed pro-

hibited by ordinance, was guilty of negligence *per se*. *Keim v. Union R. & T. Co.*, 90 Mo. 314. Besides that there is some evidence, though it is very weak, to the effect that the gripman on the west-bound train did not, as was the custom, ring the bell of his car when passing the east-bound train, upon which plaintiff was a passenger. We shall assume, for all present purposes, that this bell was not rung. It is argued for the defendant that the speed of the train had no direct agency in causing the injury, but we cannot yield a consent to the proposition. There was sufficient evidence of negligence on the part of the defendant. The important question is whether the case should have been taken from the jury because of contributory negligence on the part of the plaintiff.

Running
trains at ex-
cessive speed.

While carriers of passengers are held to a very high degree of care, there is a corresponding obligation on the part of the passenger to act with prudence; and, if his negligent act contributes to bringing about the injury, he cannot recover. Ordinarily, as has been said by this court on several occasions, contributory negligence is a question of fact, for the jury; but the power and the duty of the court to direct a verdict in proper cases cannot be questioned. As has been said, if it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury, it would be the duty of the court to take the case from the jury. *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219. A demurrer to the evidence must be sustained where an unavoidable inference of contributory negligence arises out of the plaintiff's own evidence, or out of other evidence which stands undisputed in the case. 2 *Thomp. Trials*, § 1680. But where the undisputed facts relied on to establish contributory negligence are such as may, in the judgment of sensible men, lead to different conclusions as to whether they establish want of care, the question of negligence on the part of the plaintiff should be submitted to the jury. *Petty v. Hannibal & St. J. R. Co.*, 88 Mo. 306, 28 *Am. & Eng. R. Cas.* 618. The chief difficulty lies, not in the rule, but in its application; and here we may dispose of some preliminary questions. Much reliance is, by the plaintiff, placed upon the fact that the north door was open, and without a gate or other guard to prevent persons from getting off on the north track. Though it was warm weather, the fact that the door was left open and unguarded might be regarded as an invitation to alight from that side when the car was employed in receiving and discharging passengers. But it was certainly no invitation

Contributory
negligence of
passenger.

for any one to jump off when the car was running at full speed. The very fact that the cars did not stop or check up was a warning to the passengers not to get off. In *McGee v. Missouri Pac. R. Co.*, 92 Mo. 218, 31 Am. & Eng. R. Cas. 1, the brakeman announced the station, and he and the conductor went out, taking their lights with them; and in the meantime the train stopped at a dangerous place. These facts, it was held, could be construed in no other light than a direction for the passengers to alight. The facts of that case are unlike the facts in the case at bar, as will be readily seen. The fact that the door was open cannot and ought not to be construed as any invitation to alight while the train was at full speed. It was, in substance, said in *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, that to jump from a car propelled by steam, while in rapid motion, might be regarded as mere recklessness; but to step from a car at a platform while the motion of the car is slight may or may not be negligence, and the question is one for the jury. These observations have been quoted or cited with approval in subsequent cases. *Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 604; *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593; *Leslie v. Wabash, St. L. & P. R. Co.*, 88 Mo. 52, 26 Am. & Eng. R. Cas. 219. To jump from a horse-car while in rapid motion is not negligence *per se*. *Wyatt v. Citizens' R. Co.*, 55 Mo. 487. In that case there was evidence tending to show that the conductor ordered the boy to get off. Whether a party jumping or stepping from a moving car is guilty of negligence must, it is manifest, depend upon other circumstances than the speed of the cars; and these circumstances are so variant that general rules only can be stated. If the rate of speed is so high, and the place of descent so obviously perilous, that a person of ordinary prudence would not attempt to get off, then the act is contributory negligence, and will bar a recovery. 2 Am. & Eng. Encyc. Law, 763.

Again, it is argued that the plaintiff was not bound to look out for the approaching car, because, being a passenger, he had a right to assume that defendant would do nothing to put him in danger when alighting, and in that respect he stood on a different footing from a footman crossing the track; and in support of this we are cited to *Chicago City R. Co. v. Robinson*, 127 Ill. 9, 36 Am. & Eng. R. Cas. 66. In that case a boy six years old alighted from standing grip-cars, on which he had been a passenger, and was run over and killed when going over the sidewalk crossing at or near where he got off. It was held that the fact that he did not stop and look to see whether a train was approaching was not, as a matter of law,

Duty of passenger to look out for approaching car.

and without any regard to the surrounding circumstances, negligence, but the question of his negligence was one for the jury. If a failure to look for an approaching cable train in that case was evidence of negligence, then for much stronger reasons is the failure of the plaintiff in this case to look for an approaching train evidence of negligence. Persons getting on and off of these cars are, while so doing, entitled to the protection due to passengers. The defendant is in duty bound to stop its cars, and let them remain at rest long enough for persons to get on and alight with safety; and the servants in charge of an approaching train are in duty bound to govern their conduct accordingly. But there is nothing in this case to show that defendant was required to stop its trains at crossings when no one desired to get on or off. The train upon which plaintiff was a passenger being in full motion, the servants on the approaching train would not suspect that he, or any one else, would be in the act of getting off. We do not see that the plaintiff stands on any better footing than he would if he had jumped off at a place other than a crossing. We have not said, nor do we now say, that the act of alighting when the car was in full motion, taken by itself, or the failure of the plaintiff to look for approaching cars when he reached the car-door, taken by itself, or any other single circumstances in the case, would be, as a matter of law, negligence. The undisputed evidence must be taken as a whole, and the conclusion must be drawn from the circumstances as a whole. We are not at liberty to consider them singly, and thus divide the case up into parcels. It cannot be, and we believe it is not, claimed, that the failure of the whistle to give an alarm afforded an excuse for leaving the car while in full motion.

Now, it is clear that the plaintiff was in possession of his faculties, and was accustomed to these cars, and must have known that they passed every few minutes. He left his seat without signifying any desire to get off to the brakeman, who was in close proximity to him, and without any reason to believe the cars would come to a halt. When at the door of the car he could have seen the approaching train by casting an eye east, for he then had an unobstructed view; but that he did not do so is clear. Under these circumstances, he stepped off while the cars were running at full speed, and was struck by the approaching cars as soon as he landed on the ground. With the other evidence resolved in favor of the plaintiff, and guided by what a prudent person would ordinarily do under such circumstances, it seems to us there can be but one conclusion, and that is that the plaintiff was very negligent, to express the result in mild terms. The conclu-

sion of negligence is a necessary and unavoidable result. One cannot thus voluntarily place life and limb in peril, and claim to be free from fault. But for the plaintiff's negligence, he would not have been injured. The court should have sustained the demurrer to the evidence.

The point made that the defendant waived the demurrer to the evidence by putting in its own evidence is not well taken. The demurrer was not only interposed at the close of the plaintiff's evidence, but a like request was made at the close of all the evidence. The defendant, by putting in its evidence, took the chance of aiding the plaintiff's case; but it was not thereby deprived of the right to ask the court to direct a verdict on all of the evidence. We see no reason for remanding this cause, and the judgment is simply reversed. All concur.

BARCLAY, J., concurs in reversing the judgment, but is of the opinion that this cause should be remanded.

TEXAS TRUNK R. CO.

v.

JOHNSON.

(*Texas Supreme Court, November 19, 1889.*)

Injuries to Passenger—Derailment—Instructions.—Where a passenger sues for damages for injuries sustained through the derailment of a train, and there is testimony tending to show that these injuries might have been received by a subsequent fall from a wagon, it is not error for the court to refuse to give further instructions when it has already instructed the jury, that in estimating damages, only such injuries as were caused by the derailment should be taken into consideration.

Same—Exemplary Damages—Excessive Speed—Violation of Rules.—Where there is evidence tending to show that, while the track was not in good condition, trains might be run on it at a slow rate of speed with reasonable safety, that the rules of the company required its employes not to run trains at a greater speed than twelve miles per hour, and that the train was running at a greater speed and the wreck may have been caused thereby, an injury resulting from the violation of the orders of the company as to the rate of speed, cannot be attributed to its gross negligence, indifference or disregard for the safety of its passengers, and it is not liable in exemplary damages therefor.

Same—Exemplary Damages—Defective Roadbed.—The liability of a railroad company for exemplary damages for injuries to passengers depends upon its gross negligence, indifference or disregard for their safety, and it cannot justify the defective condition of its roadbed by proving that the earnings of the corporation were insufficient to pay the operating expenses, and that no dividend had been paid to the stockholders.

APPEAL from District Court, Kaufman County.

Leake, Shepard & Miller and Morrison & Huffmaster for appellant.

Woods & Cunningham for appellee.

STAYTON, C. J.—Appellee was injured while travelling on appellant's train, which was derailed, and seeks to recover damages, actual and exemplary. Appellant admitted its liability for such actual damages as might be found, but contested its liability for exemplary damages.

The evidence tended strongly to show that appellee's right arm was fractured, and its connections injured; but there was some testimony tending to show that these injuries may have been received in a subsequent fall from a wagon. The charge of the court clearly informed the jury that in estimating damages they would take into consideration only such injuries as were caused by the derailment. This charge was such that no juror having ordinary intelligence could have misunderstood it, and we are of opinion that the court did not err in refusing further instructions on that point. The practical effect of giving the charge requested, drawn as it was after the court had given a proper charge, would have been to divert the mind of the jury from some of the issues of fact raised by the evidence, if not to induce the jury to believe that the court was of the opinion the evidence was not sufficient to show that the particular injury to which the charge referred was caused by the wreck.

Instructions
—Cause of injury.

There was evidence tending to show that, while the track was not in good condition, trains might be run on it at a low rate of speed with reasonable safety, and that the rules of the company required its employees not to run trains at a speed of more than 12 miles per hour. There was evidence, also, tending to show that the train was running at a rate of speed greater than allowed by the orders of appellant at the time of the accident, and that the wreck may have been caused by this. Under this state of facts, appellant asked the following instruction: "The court charges the jury that, if they find from the evidence that the accident by which plaintiff sustained the injuries complained of was the result of fast running of the train, and that the train was so run against the orders of defendant's superior officers, and against regulations made in that respect by defendant, then, in that event, plaintiff will not be entitled to recover more than his actual damages in this suit." This was refused. A master is liable for actual damages for an injury resulting from the negligence of his

Exemplary
damages—
Violation of
rules.

servant, in the course of his employment, even though the act be in direct violation of the master's orders; but the same rule does not apply with reference to exemplary damages. If appellant's railway could be operated with safety at the rate of speed prescribed by it for the regulation of employes, then an injury resulting from a violation of such orders cannot be attributed to the gross negligence of appellant, nor to its indifference or disregard for the safety of passengers. Such gross negligence, indifference, or disregard for the safety of passengers must exist, to render the master liable for exemplary damages; and the charge requested should have been given.

The third assignment of error is that "the court erred in refusing to allow defendant to prove by its witness T. B.

**Non-payment
of dividend.** Donaho that during the time the present owners of said road owned the same, to wit, over three

years last past, there had been no dividend declared or paid to the defendant's stockholders; that the earnings and receipts from the operation of the railroad were not sufficient to pay operating and other expenses, and keep the road in repair; and that there was no money from the receipts of the road to make repairs and betterments, and furnish and place in position the necessary cross ties; and that the owners of the road—of its stock—had to take out of their own pockets money to meet the deficits in the operating of defendant's road, and for the purpose of keeping it in repair, and in purchasing cross ties for the road; and that during all that time the stockholders of defendant's company had not received a dollar from the receipts and earnings from the operation of defendant's road. Defendant offered to make this proof by said witness on the issue of exemplary damages claimed in plaintiff's petition, and to show that the owners of the stock of said road had not appropriated said receipts or earnings; but, on the objection of plaintiff, the court held such evidence incompetent, and refused to allow defendant to make said proof by said witness." The liability of a railway company for exemplary damages cannot be made to depend on the ability of the corporation to keep its road in such condition that it can be operated with safety to passengers. A corporation or individual who attempts to conduct a business public in its character, in the course of which the lives and limbs of persons dealing with them are imperiled, is held responsible in exemplary damages, whenever the means used to conduct the business are so manifestly insufficient to enable them to conduct it safely as to manifest indifference to duty or reckless disregard for the safety of persons. The legal culpability is as great when the failure, in such cases, to fur-

nish safe appliances results from inability arising from the want of sufficient money or credit, as it is when it arises, not from a lack of means, but from an indisposition to use them. The moral culpability may be greater in the one case than in the other, but the legal is the same, whether it results from the one cause or the other. There is no law which compels a railway corporation either to construct or operate a railway, though, if this be voluntarily undertaken, the failure to operate may give the state the right to withdraw the rights and powers given by the act of incorporation. A railway must be presumed to be operated by the company owning it, for its own benefit; and whether this consists in actual profit to stockholders, or the mere avoidance of facts which would authorize the state to demand a forfeiture, is immaterial, in so far as liability to persons for failure to use care may be in question. If a railway company elects to pursue the business of passenger carrier, with full knowledge that this is done without appliances reasonably sufficient, when carefully used, to enable it to safely transport them, it matters not, on a question of liability for an injury, what may be the cause or motive for such action. If the company has not the means to place its roadway in safe condition, it should cease to use it for the transportation of passengers; but if it elects not to do this, and for any reason continues to hold itself out as a carrier of passengers, and receives them, when its appliances are known to be insufficient, when carefully used, for the safe conduct of such a business, then, so long as damages are given for the purpose for which it is said exemplary damages are given, it must be held that such damages may be properly imposed. The law gives no guaranty to the stockholders of a railway or other corporation that its business shall yield dividends or funds sufficient to keep in repair the appliances with which its business is conducted, but holds them, as it does individuals, when they conduct a business public in its character, liable for damages, actual or exemplary, as the degree of negligence shown may warrant, under the rules of law applicable to the measure of damages. The court did not err in excluding the evidence offered; but, for its refusal to give the charge before referred to, its judgment must be reversed, and the cause remanded.

BALTIMORE & OHIO R. CO.

v.

STATE, to use of WILEY *et al.**(Maryland Court of Appeals, February 5, 1890.)*

Passenger—Postal Clerk—Contributory Negligence—Travelling in Mail Car.
 —Where the evidence shows that postal clerks holding photographic commissions are entitled to ride as passengers on trains while on duty and in returning home, and that by the permission of the conductor, a postal clerk holding such a commission travelled while off duty in the mail car and was injured in a collision, he is not guilty of contributory negligence *per se* so as to defeat a right of action for his death, although there was greater risk of injury in the mail car, and he would have escaped injury if he had continued his journey in the smoking car where he commenced it.

APPEAL from Circuit Court, Howard County.

Henry E. Wooten, John K. Cowen, and W. Irvine Cross for appellant.

William A. Hammond and Henry V. D. Johns for appellees.

IRVING, J.—This suit was brought in the name of the state, for the use of Lucy A. Wiley and others, to recover damages for the death of William H. Wiley, husband and father of the equitable plaintiffs, occasioned by collision of appellant's trains going in opposite directions. The negligence of the appellant's officers is conceded, and appellant relies wholly on what it claims to have been contributory negligence on the part of the deceased as its defense to the action.

The deceased was chief postal clerk in the United States railway mail service. He held what is known as a "photograph commission" from the government. His route was
Facts. from Baltimore to Grafton. He was entitled under his commission to ride as a passenger on the appellant's trains, by virtue of his commission, while in the active discharge of duty, or in going from and returning home. At the time of the accident he was not in active duty, but was returning to his home until he should be called to duty again in a few days. He rode on the occasion of the accident in the smoking car from Baltimore to Washington, and the conductor saw and recognized his commission as entitling him to ride in the cars, and the conductor testifies he did not see him any more. He had left the smoking car and gone into the postal car, where, after chatting a while with those on duty in that car, he lay down upon the mail matter and went

to sleep. The collision came. The postal car was crushed, and the dead body of the deceased was found in the *debris*. The witnesses say if he had remained in the smoking car he would probably not have been killed, as nobody was hurt in it. His presence was not required in the postal car, as he was off duty, and returning home, subject to call into active service within six days, or sooner, if needed. The evidence shows that no one was allowed to ride in the postal-car but such as had a photographic commission or a permit, and those who held the permit had to pay fare. It was the custom of the conductors to allow persons holding photographic commissions to ride either in the postal car or in any part of the passengers cars. Sometimes they would ride in one, and sometimes the other, and the conductor testifies that he made no objection. The conductor was not admitted into the postal car, but it was the duty of the postal clerk in charge there to report to him the presence of any one chargeable with fare, and that, when notified that clerks not on duty were in that car, he made no objection. It was also in proof that the deceased had, before that time, upon his photographic commission, been permitted on previous occasions to ride in the postal car when going on or returning from duty.

Two exceptions were taken to the admission of evidence as to the custom of the conductor in giving permission of that sort, but they were waived at the hearing in this court, so that the sole question intended to be raised by those exceptions is left as presented by appellant's prayer, which goes to the effect of that evidence. It was rejected by the court below.

Contributory
negligence—
Travelling in
mail car.

That prayer is as follows, viz.: "If the jury find that the deceased, at the time of his death, was a clerk in the railway mail service, and on the eighth of October last entered the train of the defendant at Baltimore and rode to Washington in the smoking car attached to said train, and upon reaching Washington he left the smoking car and entered the postal car at Washington, attached to said train, as testified to by the witness Atkinson, and continued to remain in said postal car until the time of the accident, and was in said car when he met his death, and that from its position in the train the postal car was subject to greater risk of danger than the cars intended for the transportation of passengers; and further find that, when said deceased entered said postal car, he was not on duty as postal mail clerk and had no official duties to discharge in said car, but was returning to his home at Grafton, where he would have remained six days, unless sooner called into active service, and that, if the deceased had remained in the smoking car or been seated in any other car

attached to said train intended for the transportation of passengers he would not have been killed,—then their verdict must be for the defendant, notwithstanding the jury may further find that the deceased had with him a pass, in the evidence called a 'photographic commission,' entitling him to free transportation on said train, which was offered in evidence by the plaintiff." In effect this prayer asked the court to say, as matter of law, that, notwithstanding the postal car was the place where the plaintiff ordinarily remained, and was required to remain, as a passenger when in the discharge of his postal duties, still, if he was not in the discharge of his official duty, it was fatally contributory negligence for him to be in that car, although the conductor was in the habit of allowing him to be in that car when returning to his home when he was not on duty. We know of no case which would justify such a ruling. Both reason and authority lead us to think the ruling of the circuit court was entirely right in rejecting this prayer.

It may be that the location of the postal car was, by reason of its greater proximity to the engine, a place of greater danger than the smoking car or other passengers cars. Still it was a car for the occupancy of passengers who were entitled to ride as such because of their official position or connection with the post office department of the government, or who paid their fare, and were connected with that department. There was no rule of the company forbidding the deceased to enter that car, and occupy the same, if he was not in actual service. It was his habit to occupy it when he was returning from duty whenever he chose, and the conductor, who is conceded to be a general agent of the company, not only made no objection, but permitted him from time to time to do so. There are cases, no doubt, where the invitation or permission of the conductor would not protect a man in running a risk which was so obviously dangerous that a prudent man would not think of incurring it. *Patt. Ry. Acc. Law*, § 276, and cases cited. To justify a court in saying that conduct is *per se* contributory negligence, the case must present some such feature of recklessness as would leave no opportunity for difference of opinion as to its imprudence in the minds of ordinarily prudent men. *Kane's Case*, 69 Md. 21; *Maugans' Case*, 61 Md. 61, 18 Am. & Eng. R. Cas. 182; *Fitzpatrick's Case*, 35 Md. 46; *Stansbury's Case*, 54 Md. 655, 4 Am. & Eng. R. Cas. 574. Here the deceased was doing what he was actually required to do for the larger part of his time on the cars and was permitted to do the rest of his time when on the cars. It was provided for his occupancy when on duty as postal clerk, and his not being on duty did

not make the car more dangerous to him. His act, therefore, in no way contributed to the result which happened. A case precisely like it, being the case of a postal clerk not on duty, and in the postal car, and injured while there by the gross negligence of the company's agents, is found in *Carroll v. New York & N. H. R. Co.*, 1 Duer (N. Y.), 578. The plaintiff in that case was in the postal car by the permission of the conductor, and was allowed to recover damages. The same principles were given effect in *O'Donnell v. Allegheny Val. R. Co.*, 59 Pa. St. 239, and in *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139. In the last case the court says there is no legal presumption of negligence arises from the fact that the passenger was in a car not intended for passengers. *Langdon's Case*, 92 Pa. St. 27, 1 Am. & Eng. R. Cas. 87, cited by appellant's counsel, there was an emphatic rule of the company forbidding a passenger to ride in a baggage car, which was controlling. We can find nothing in the decided cases inconsistent with the view entertained by the circuit court in rejecting the appellant's prayer, and the judgment will be affirmed.

Contributory Negligence—Travelling in Car other than Passenger Car.—See *Blake v. Burlington, C. R. & N. R. Co.* (Iowa), 39 Am. & Eng. R. Cas. 405; *Kentucky Cent. R. Co. v. Thomas* (Ky.), 1 *Id.* 79; *Houston & T. C. R. Co. v. Clemmons* (Tex.), 8 *Id.* 396; note 13 *Id.* 28.

RUTHERFORD

v.

SHREVEPORT & H. R. Co.

(*Louisiana Supreme Court, October, 1889.*)

Passengers—Negligence—Defective Roadbed.—It is negligence on the part of a railroad company, incurring liability for damages, to have an accident caused by the existence of rotten cross-ties on its roadbed, by reason of which a train of cars is derailed and upset, causing personal injuries to passengers.

Same—Measure of Damages.—The measure of such damages is the injuries received, the sufferings experienced, and the consequent losses sustained, by the injured passenger.

Same—Punitive Damages.—In Louisiana, the doctrine of exemplary or punitive damages, as applicable to common carriers, is not yet definitely sanctioned.

APPEAL from District Court, Parish of Caddo.

Wise & Herndon for appellant.

J. H. Shepherd for appellee.

41 A. & E. R. Cas.—9

POCHE, J.—Plaintiff seeks to recover damages in the sum of \$10,000, for injuries received by him in an accident while he was a passenger on one of the defendant company's trains. The case was tried without a jury, and the defendant appeals from a judgment which allows to plaintiff \$200 as damages for personal injuries, and \$500 as exemplary or punitive damages. By way of answer to the appeal, plaintiff prays for judgment in the full amount of his demand.

The evidence shows, to our entire satisfaction, that the accident, which was caused by the derailling of the locomotive of a passenger train, and an upsetting of the passenger coaches, was the result of the defective condition of the road at the point where the accident occurred owing to rotten ties, which gave way under the weight of the locomotive, resulting in the injuries which plaintiff received on the occasion. That was negligence on the part of the company, by reason of which it must be held liable in damages for the injuries received, the sufferings experienced and the losses sustained in consequence thereof, by plaintiff. It appears that his injuries were not grievous, his sufferings not intense, and the consequent loss of time and of business slight, and not of long duration. Hence we are in perfect accord with our learned brother of the district court, who held that the sum of \$200 was an adequate and sufficient compensation on that score. *Maier v. Louisville, N. O. & T. R. Co.*, 40 La. An. 64.

But the district court held that the circumstances of this case, which exhibit, on the part of the company, gross negligence, coupled with willful misconduct to such an extent as to raise a presumption of conscious indifference to consequences, justify the infliction of exemplary or punitive damages, for which he allowed \$500. The question of the applicability of the doctrine of exemplary damages, partaking of the nature of punishment, to our system of laws, has been the subject of many conflicting opinions in our own jurisprudence. And while the doctrine as applied to acts of willful and malicious torts on the part of natural persons, is universally recognized in common-law jurisprudence, it has not yet received unanimous sanction in courts of that system in its application to suits in damages against corporations, and particularly as to railroad companies and other common carriers. The question is discussed at length and with ability by the district judge in this case, and it presents a subject of attractive study. Our own jurisprudence is not yet definitely settled on the question, and it is perhaps desirable that it should be, but, under our appreciation of the evidence in the present case, we conclude that the occasion has not yet arisen.

**Negligence—
Liability for
exemplary
damages.**

Conceding, *arguendo*, that in Louisiana a railroad company may be mulcted in exemplary or punitive damages, for acts of gross negligence evincing wanton, willful or malicious misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences, we fail to find such a state of facts in the record of this case. *Black v. New Orleans & C. R. Co.*, 10 La. An. 33; *Varillat v. New Orleans & C. R. Co.*, *Id.* 88; *Hill v. New Orleans, O. & G. W. R. Co.*, 11 La. An. 292; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489; 2 Ror. R. R. 869-871.

From the preponderance of the evidence in the case, it appears that the defendant's road was not in good condition, at the time that the accident happened; that, while the roadbed was in good repair, many of the cross-ties were decaying and rotten, and that the accident was attributable solely to the latter fact.

Punitive damages—Sufficiency of evidence.

Hence flows, as above stated, the liability of the company for actual injuries and consequent losses sustained by the party injured. In fact, we understand this to be conceded by its counsel. But, beyond this, the record shows that the road had not been operated for more than four years, and that average cross-ties usually last six years. It is in proof that the company was actively engaged in repairing its road; in replacing old and decayed ties by new ones; that it had skillful laborers, known as "section bosses," actually employed at such work, which was in progress as rapidly as circumstances would allow or permit. To have not begun the work earlier, and to have not sufficiently accelerated its operation, was negligence; but we find no element of willful or wanton disregard in such negligence of the company's obligations and duty towards its passengers, and much less can we discern any element of wanton or malicious and conscious indifference to consequences. Hence on that point we are constrained to differ with the district court, and we hold that, conceding the law to be as the plaintiff contends, the facts of this case do not justify its application by way of vindictive damages.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by reducing the amount of the allowance of damages from seven to two hundred dollars, and that as thus amended said judgment be affirmed, at plaintiff's costs on appeal.

Passenger Injured Owing to Defective Track—Evidence.—The plaintiff while a passenger on one of defendant's trains was injured in an accident caused by a broken rail. Six or seven disinterested witnesses testified that the cross-ties at the place of the accident were very rotten, that the rails were old and very much worn, and that the flanges were broken down, and that the broken rail was mashed at the place where it was broken.

The only witness introduced by defendant on this question was the section boss, who testified that the track was in good and sound order, except that one of the cross-ties where the broken rail was fastened was decayed, but that it was not rotten. The broken portions of the rail were not produced on the trial. *Held*, that the testimony established negligence on the part of the defendant, and a liability to the plaintiff for injuries received. *Newman v. Alabama G. S. R. Co.*, 38 Fed. Rep. 819.

Exemplary Damages for Injuries to Passengers Arising from Negligence.—

The decisions of the courts concerning the liability of railroad companies for negligence in transporting passengers unaccompanied by any acts showing actual malice on the part of their servants, are not uniform. Thus, in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, where the plaintiff sued to recover damages for an injury caused by defendant's negligence in permitting two trains to collide, it was held that exemplary damages could not be recovered, when there was no proof that the injury was inflicted maliciously or wantonly; and it was also declared that gross negligence is a relative term, and means the absence of care that was necessary under the circumstances, but that the absence of this care alone, whether called gross or ordinary negligence, did not authorize the jury to give damages beyond the limit of compensation for the injury actually inflicted. In *Wardrobe v. California Stage Co.*, 7 Cal. 119, where the injuries to a passenger were occasioned by the negligence of the driver of a stage-coach, it was held that the carrier was liable only for simple negligence, and that exemplary damages could not be recovered. So, too, in *McKeon v. Citizens' R. Co.*, 42 Mo. 79, the plaintiff, a passenger, sued for injuries, and it was held that although the conduct of the driver might be willful and malicious and with intent to injure the plaintiff, and he might be liable to indictment for assault with intent to kill or some other criminal offense, his employer was not liable for his acts of willful or malicious trespass, and that he was only liable in compensatory damages for his negligence or his incapacity, or unskillfulness in the performance of his duties.

In *Ackerson v. Erie R. Co.*, 32 N. J. L. 254, the court seems to have adopted a modified view. The action was brought to recover damages sustained while traveling upon a railroad by reason of the carelessness and disobedience of the employes of the company; and it was held that as it appeared that the defendant had adopted all needful rules and regulations for the running of its trains and had employed competent persons, and the accident had only happened through the disobedience of the employes and their failure to observe the rules, the company could not be held liable for the failure of its servants in performing their duty. The court declared, however, that if the company, as such, were in fault, a different rule would be applied and it might then be liable in punitive damages. In *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347, it was held that a railway company cannot be held liable in punitive damages merely for the gross negligence of its servants, but that if it employed incompetent, drunken or reckless servants, knowing them to be such, or having employed them with such knowledge, retains them after learning the fact, or after full opportunity to learn it, the company is liable in exemplary damages. See also *Cleg-horn v. New York C. & H. R. R. Co.*, 56 N. Y. 44; *Beale v. Railway Co.*, 1 Dill. (U. S.), 568.

Same decisions support the view that punitive damages may be recovered where the negligence of the employes is grossly culpable. In *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282, it was held that where the servants of the company were guilty of negligence so grossly culpable as to evince utter recklessness or disregard for the safety of the passengers, the company was liable. See also *Alabama G. S. R. Co. v. Arnold*, (Ala.)

30 Am. & Eng. R. Cas. 546; *Kentucky C. R. Co. v. Dills*, 4 Bush (Ky.), 593. *Williamson v. Western Stage Co.* 24 Iowa 171. And where through gross negligence, there was a collision of a passenger and a freight train and the plaintiff was injured, an instruction that it was a proper case for exemplary damages was sustained, the court saying that it was a subject in which all the travelling public were deeply interested; that railroads had practically monopolized the transportation of passengers on all principal lines of travel; that there ought to be no lax administration of law, and that it would be difficult to suggest a case more loudly calling for exemplary damages. *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9.

In *Maysville & L. R. Co. v. Herrick*, 13 Bush (Ky.), 122, it was declared that exemplary damages may be awarded if the evidence shows gross negligence—in other words, the absence of slight care—and that it is not necessary to show the absence of all care, or reckless indifference to the safety of passengers, or intentional misconduct on the part of the agents and officers of the company; and it has been declared that a railroad company impliedly warrants that its engineers, conductors and other employees engaged in running its trains, are possessed of due skill, and competent and faithful, that it is liable under all circumstances for any injury occasioned by the misconduct, rashness or negligence of such person, and that exemplary damages may be recovered therefor. *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242.

But only in an extreme case will a railroad company be liable in punitive damages for the misconduct of an employee. *Fisher v. Metropolitan Elevated R. Co.*, 34 Hun (N. Y.), 433. For injuries caused by the negligence of a servant while engaged in the business of the master within the scope of his employment, the latter is liable for compensatory damages, but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent or had formed bad habits and was unfitted for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established, and corporations may incur this liability as well as private persons. *Cleghorn v. New York C. & H. R. R. Co.*, 56 N. Y. 44. But railroad companies are not liable for punitive damages for the acts of their servants done under circumstances which would give no right to punitive damages as against the servant, had the suit been brought against him instead of the master. *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25; *Townsend v. New York C. R. Co.*, 56 N. Y. 295. When there is evidence tending to show gross negligence on the part of the defendant, the degree of negligence is for the jury, and an instruction that the plaintiff cannot recover exemplary damages invades its province and is properly refused. *Alabama G. S. R. Co. v. Arnold* (Ala.), 30 Am. & Eng. R. Cas. 546.

Where there is evidence tending to show that while the track was not in good condition, trains might be run on it at a slow rate of speed with reasonable safety; that the rules of the company required its employees not to run at a greater rate of speed than twelve miles an hour, and the train was running at a greater rate of speed and the wreck might have been caused thereby, an injury resulting from the violation of the company's orders as to the rate of speed, cannot be attributed to its gross negligence, indifference or disregard for the safety of its passengers, and it is not liable in exemplary damages therefor. The liability of a railroad company for exemplary damages for injuries to passengers depends upon its gross negligence, indifference or disregard for their safety, and it cannot justify the defective condition of its roadbed by proving that the earnings of the corporation

were insufficient to pay the operating expenses, and that no dividend had been paid to the stockholders. *Texas Trunk R. Co. v. Johnson* (Tex.), *ante*, p. 122.

The testimony showed that the railroad train upon which the deceased was riding as a passenger was thrown from the track, and that thereby the deceased received the injuries from which he died, but failed to show any unusual speed or want of care in the management of the train, or, by any direct evidence, the cause of the train's being thrown from the track. It disclosed as the only evidence of negligence on the part of the company the fact that some of the ties at and near the place of the accident were rotten, and it appeared that the company had a suitable and competent person in charge of the track at that place as section boss, and that he was from time to time and as fast as he deemed necessary for the safety of the track replacing the old and rotten ties with new and sound ones. *Held* that no case was shown for exemplary damages. *Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83. But in *Maysville & L. R. Co. v. Herrick*, 13 Bush (Ky.), 122, it was held that exemplary damages might be recovered under the Kentucky statute allowing the recovery of such damages in cases of gross negligence when the evidence showed that a railroad company failed to use such diligence in keeping a bridge in repair as careless and inattentive persons usually exercise in the preservation of the same, or of business of like character.

It has been held that punitive damages cannot be recovered when the negligence charged is the failure to sufficiently light depot grounds; *Alabama G. S. R. Co. v. Arnold* (Ala.), 35 Am. & Eng. R. Cas. 466; or the permitting of ice to remain upon a station platform; *Seymour v. Chicago, B. & Q. R. Co.*, 3 Biss. (U. S.), 43. Where the injuries were caused by the overturning of a street car, it was held that exemplary damages could not be recovered; *Louisville & P. R. Co. v. Smith*, 2 Duv. (Ky.), 556; nor when they were caused by a street car upon which plaintiff was travelling being started before allowing her sufficient time to alight. *Augusta & S. R. Co. v. Randall* (Ga.), 34 Am. & Eng. R. Cas. 439. On a rainy day when the track was slippery, defendant's engineer in charge of a freight train, uncoupled cars loaded with coal whilst standing on a side track. In consequence of the uncoupling and of neglect to block or to turn the switch, two cars collided with an approaching passenger train, and plaintiff's injuries were caused without fault on his part by jumping from the train to avoid the effects of the collision. *Held* that the case was not one for exemplary damages. *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580. Where the evidence showed that a stage company sent a driver who had never driven over the road before, on a very dark and stormy night, that he got out of the road, and for that reason ran over a large stump, causing the coach to upset suddenly, a verdict, finding the defendant liable in exemplary damages on the ground of gross negligence, is sufficiently sustained. *Williamson v. Western Stage Co.*, 24 Iowa 171.

Plaintiff's injury was caused by a train running into a river through the open draw of a bridge a few minutes after six o'clock in the morning. The bridge tender, it was shown, could neither read nor write, but it was not made to appear that the accident was in any degree attributable to that fact. Evidence tending to show inattention on the part of the engineer was also given. The court charged the jury: "If you find from the evidence that the conduct of the engineer or the conduct of the railroad company in the employment of a bridge keeper who could neither read nor write, amounted to such a reckless indifference to human life as to constitute wilful and malicious conduct, then you may be justified in giving exemplary damages." *Held* error. *Brooks v. New York & G. L. R. Co.*, 30 Hun (N. Y.), 47.

MOAKLER

v.

WILLAMETTE VALLEY R. Co.

(Oregon Supreme Court, November 18, 1889.)

Passenger—Contributory Negligence—Arm on Window Sill.—Where a passenger was riding on a car with his elbow resting on the window sill, and slightly projecting out of the window, but his hand and wrist were inside, and a stick of cordwood fell from the pile corded or stacked near the track, through the open window at which he sat, striking in the palm of the hand, or near it, catching in the mouth of the coat sleeve, and jammed the arm backward, and injured it, *held*, that the facts were not such as the court could decide to be negligence in law by allowing a nonsuit, but were for the jury.

APPEAL from Circuit Court, Multnomah County.

C. H. Carey and Mitchell & Tanner for appellant.

C. J. McDougall for respondent.

LORD, J.—This is an action brought by the plaintiff to recover damages for an injury alleged to have been caused by the negligence of the defendant while he was a passenger on one of its trains. By his answer the defendant denied the negligence alleged, and averred that the negligence of the plaintiff contributed to his injury. To this the plaintiff filed his reply, and, issue being thus joined, the trial was proceeded with until the plaintiff rested his case, when the defendant, by his counsel, moved for a judgment of nonsuit, upon the ground that the evidence showed that the plaintiff was guilty of contributory negligence, which the court allowed, and from which the present appeal is taken. Explanatorily, it may be said that the evidence showed that large piles of wood were corded, at places along the track, about one foot or a foot and a half from the cars, and so high that passengers often could not see out on account of it; that from one of these piles some of the sticks fell upon the cars, and through the window at which the plaintiff was sitting, with his arm resting on the window sill, causing the injury complained of. As relevant to the point upon which this case must be determined, it is necessary to understand how the injury occurred. Mr. O'Leary, a witness for the plaintiff, testified: "It hit him in the palm of the hand; that is where the wood hit him. It was not on the elbow. The elbow went up against the jamb of the window, and that is what hurt his elbow. (2) How was his hand?"

Case stated.

Evidence.

Answer. Probably a few inches out of the window. The force of the stick and the car going, of course, hurt his elbow; that is what done it." On cross-examination, after testifying that the stick came through the open window, in reply to the question that the stick struck him "when his hand was outside," he says: "His hand was inside. It was the wood that hit his hand; it did not hit his elbow. *Question.* It pressed his hand back this way? *Answer.* Pressed it back against the window, and that is what hurt it—hand inside the window. *Q.* Elbow outside? *A.* Yes, sir; I think so. *Q.* How far did the elbow extend outside? *A.* May be a few inches; I don't know." It will be noted that this witness first stated that the plaintiff's hand was "probably a few inches out of the window," but on his cross-examination testifies that it "was inside the window," and that the "elbow was outside" of the window a few inches. Looking at the whole of the evidence, and the manner in which he says the injury occurred, it was probably the elbow to which he referred; and this, too, is consistent with the testimony of the plaintiff, who succeeded him as a witness. After some preliminary matters, the plaintiff testified: "*Q.* Now, you may state whether or not any part of your arm was projecting outside of the car. *A.* No, sir; it was right on the window sill. *Q.* You say that this falling stick of wood caught in your coat, and jerked your hand out? *A.* Sitting just like here, [explaining by reference to witness-box;] stick struck just here, [referring to the mouth of his coat sleeve,] and pulled it out," etc. "I was this way: Train going this way; arm on the window right here. The first thing I knew, a piece of wood, coming in, grabbed my coat sleeve in the mouth of it, something like here, and just pulled my arm out, and got jammed backwards," etc. "*Q.* Your arm was resting on the window? *A.* Resting on the window. [Evidently means resting on the window sill.] *Q.* Was your elbow out three or four inches? *A.* Two or three inches—may be four inches? *Q.* Caught in the palm? *A.* No, sir; in the coat sleeve, and pulled right out."

It will be observed that both witnesses agreed that the hand was inside, and that the elbow was outside, of the window; that the stick of wood which did the injury came through the open window, and one says struck the palm of his hand, and the other, caught in the mouth of his coat sleeve; but both agree that the stick did not hit the elbow and as to the manner it operated in jamming the arm backwards and producing the injury. The plaintiff's testimony is that his arm was resting on the window sill, but that no part of his arm was outside of the car, although he admitted it was outside of the window. This must be based on the idea that the

window sill slightly extended beyond the exterior surface of the car. The truth is, it is generally difficult to reconcile the testimony in cases of this character, and reach a state of facts not disputed and beyond the reach of controversy. At any rate, in our judgment, the evidence submitted by the plaintiff tended substantially to establish this state of facts: That the plaintiff, while riding as a passenger on one of the defendant's trains, rested his arms on the window sill of an open window, with his hand inside, but his elbow extending a few inches outside of the window; that alongside of the track a great quantity of cord wood was piled at places so high as to obscure a view from the window of the cars, and at a distance of a foot or a foot and a half from the cars; that while thus riding some of the sticks of cord wood fell from the pile, and against the cars, and through the window, upon his palm, or caught in the mouth of his coat sleeve near the palm, and jammed his arm backward, breaking it, and badly lacerating his arm and hand. As here used, when it is said that the elbow was outside of the window, it is meant that it was outside of the surface of the window, and exposed to injuries from external objects. It was so treated at the argument, and it will be so considered by us.

Facts established.

The injury, then, presented by this record is: Do the facts show such an act of contributory negligence on the part of the plaintiff as will prevent a recovery, and make it the duty of the court, to so declare as a matter of law, notwithstanding the negligence of the defendant in permitting the wood to be so carelessly piled near the track of the passing train? "Contributory negligence" is defined to be "a want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with the negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." 4 Am. & Eng. Encyc. Law, 17. The law will not permit a recovery where the plaintiff, by his own negligence, has contributed to produce the injury from which he has suffered. "And it matters not," said Mr. Justice FIELD, "whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong." And he adds that "it would seem that the converse of this doctrine should be accepted as sound; that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensa-

Contributory negligence.

tion in damages from the wrong-doer." *Little v. Hackett*, 116 U. S. 371.

To have adjudged the plaintiff guilty of contributory negligence, upon the facts, the court must have found that there was want of ordinary care on his part, and a proximate connection between such want of ordinary care and the injury complained of. Our case, then, is thus put up by Mr. Beach: "(1) Did the plaintiff exercise ordinary care, under the circumstances? (2) Was there a proximate connection between his act or omission and the hurt he complained of?" Beach, *Contrib. Neg.* § 3, p. 7. If these two questions be answered in the affirmative, the two elements concur which constitute contributory negligence, and, in the sense of the law, the plaintiff is responsible for his own wrong, and is precluded from a recovery.

The facts show that the plaintiff's elbow was slightly extended outside of the window, but that the other portion of his arm and hand was inside of the window. The **Resting arm on sill.** elbow was not hit, but a stick of wood, falling through the open window at which he sat, and upon the sill on which his arm rested, struck the part of the arm inside of the window, and caught in the mouth of the coat-sleeve, which, with the motion of the train, jammed the arm backward against the frame of the window, and produced the injury complained of. Now, it will be noted (1) that, although the elbow was outside of the window, it was not hit, and the injury did not arise as the direct consequences of the exposed condition of the elbow to external objects with which it might come in contact by reason thereof; and (2) that the hand and part of the arm which were struck with the stick were within the window. The facts concede that an injury would be likely to happen if the elbow had not been exposed, while the arm continued to rest upon the window-sill in the same relative position. By merely changing the angle of the inclination of the arm, so that the elbow would not be exposed, leaving the arm otherwise in the same relative position, a similar injury would have likely happened or resulted, upon the facts. But in neither case, whether the elbow was inside or outside of the window, is the injury occasioned by or the result of its contact with external objects. Yet this judgment punishes the plaintiff with the same consequences as if the injury resulted from exposing the arm outside of the window to contact with external objects. In that view it makes no difference whether the arm or elbow is inside or outside of the window when the injury occurred,—the same legal consequences ensue; but this cannot be, unless it be a negligent act to rest the arm on the

window-sill of the car, irrespective of the fact whether the injury occurred to the exposed part of the arm or not.

The counsel for the defendant insists that the plaintiff, by exposing his elbow two or three inches out of the window, contributed to produce the injury of which he complains, and that without it he would not have been injured. He places the injury upon the same

Authorities
examined.

footing as if it had occurred in consequence of the elbow being struck by reason of its exposure to passing objects external to the car, and, as a consequence, asserts that the conduct of the plaintiff was negligence *in se*, and, as such, that it was the undoubted duty of the trial court to grant the nonsuit. In support of this position, he cites *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329; *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.), 18; *Dun v. Seaboard & R. R. Co.*, 78 Va. 645, 16 Am. & Eng. R. Cas. 363; *Louisville & N. R. Co. v. Sickings*, 5 Bush. (Ky.) 1. It will be best to ascertain the facts upon which the law is predicated in these cases, to understand the reason of it and the principle applied. In *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294, the plaintiff was injured "while a passenger in the cars of the defendant, by reason of the protrusion of his elbow beyond the sill of the car window next to which he sat during the journey, or part of it, coming in contact with a car standing on a switch on the defendant's road." In *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.), 18, the court say that "the only error in the instructions of the court related to that part of the case which involved an inquiry into the position of the plaintiff's arm at the time of the accident. If he was then riding in the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care, which would prevent him from maintaining his action." In *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 83, "the evidence showed," says the court, "that the injury received was a broken arm, and that at the time of the accident the plaintiff's arm was projecting out of the window of the coach in which he rode, in consequence of which it came in contact with some object outside, probably a timber frame supporting a water-tank." In *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 342, the court say: "It is admitted his arm at the time was out of the window," and that "it is perfectly clear he would have received no injury if his arm had not been in this position." Without further reference, it is enough to say that the plain result of these cases is that if a passenger is riding in a car, with his elbow or

arm projecting out of the window, by reason of which he sustained an injury, it is such a clear act of contributory negligence on his part as will prevent a recovery, and make it the duty of the court to so declare, as a matter of law, notwithstanding the negligence of the defendant in permitting obstacles to be placed too near the track of the passing train.

But why is it contributory negligence, within the reason of these cases? The answer is, because, in projecting his elbow or arm out of the window, he was bound to know, as a reasonable man, in the exercise of ordinary care and foresight, that there was liability to injury from the exposed condition of the arm coming in contact with some external obstacle or force. He ought to know, to expose his arm or elbow under the surrounding circumstances, that it was dangerous, and liable to result in injury to it, because a prudent man might well foresee the possibility of such an occurrence; and, if he do not avoid it by the exercise of such reasonable foresight, he may justly be held to have taken upon himself the risk of such a peril. It is therefore considered in these cases to be a want of ordinary care for a passenger riding in a car to protrude his arm or elbow out of the window, and if he does, and is injured by reason thereof, it results, as a consequence, that his own want of ordinary care has contributed directly to produce such injury as the proximate cause thereof. But how is this to apply to the facts in the case at bar? It was not the elbow of the plaintiff, or any part of his arm that was exposed to injury from outside obstacles, that caused the injury. His elbow, or the part of the arm outside of the window, was not hit. The stick of wood struck the palm of his hand, or so near it as to catch in the mouth of the coat-sleeve, which was inside of the window, and not exposed to external objects, unless they came inside of the window, as the evidence here shows. The cases referred to, and relied upon by counsel, proceed upon the hypothesis that the injury occurred because the elbow or arm which was exposed out of the window came in contact with some external obstacle or force, and produced the injury. In the strongest of these cases, *Pittsburg & C. R. Co. v. McClurg*, and often cited, *THOMPSON, C. J.*, said: "If he allow it [arm] to protrude out, and is injured, is this due care?" which *BIGELOW, C. J.*, had previously answered in *Todd v. Old Colony & F. R. R. Co.*, *supra*, saying: If he was riding in the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care." The due care here required to be exercised is not to expose the arm out of the window, as there is liability that it may come in contact with outside obstacles.

It is based on the idea that, when an arm is thus exposed, the injury which may result may be foreseen and avoided by the exercise of ordinary circumspection. It has no reference to risks or injuries which, according to common experience, and in the exercise of reasonable care and foresight, could not have been anticipated, or their consequences avoided. "We are not to link together," said AGNEW, J., "as cause and effect, events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury; but we are not justly called to suffer for it, unless the other event was the effect of our act, or was within the probable range of ordinary circumspection, when engaged in the act." *Fairbanks v. Kerr*, 70 Pa. St. 86. Sitting, as he was, with his arm resting on the window-sill, and his elbow projecting out, especially in view of the fact that a similar injury would have probably occurred whether the elbow was inside or outside of the window, was it within the range of ordinary circumspection and foresight to have anticipated, as likely to happen, the event which occurred, and produced his injury,—to have anticipated that a stick of wood should fall through the open window, and inside of it, and strike his palm, or so near it as to produce the injury admitted, in consequence of the act in which he was engaged? Under the circumstances of this case, are we authorized to say, as a matter of law, that by the exercise of ordinary care and prudence he could have foreseen that there was liability to injury in the way in which it occurred, as the consequence of his act?

Be it remembered that the injury did not arise because the elbow projected, but because the stick struck the palm or wrist inside of the window, where it had a right to be, and worked its injury, and the case, upon its facts, would seem to stand precisely as if the arm rested on the window sill entirely within the car. The law is well established that this cannot be declared to be negligence *in se*. In *Farlow v. Kelly*, 108 U. S. 288, 11 Am. & Eng. R. Cas. 104, it was held that it was not contributory negligence for a passenger to rest his arm on the window sill of a car in which he was riding without allowing it to project. Such an act creates no presumption of negligence, and cannot be declared negligence in law. *Breen v. New York, C. & H. R. R. Co.*, 109 N. Y. 297, 34 Am. & Eng. R. Cas. 523; *Winters v. Hannibal & St. J. R. Co.*, 39 Mo. 470. The inception of the injury being in-

side of the window, it was not caused by any exposure of the arm outside of it, and can we say, logically or judicially, that the act of the defendant contributed to produce it? It would seem as to the facts upon which that injury was predicated, that he stood without fault, for although the plaintiff may have been negligent in allowing his elbow slightly to extend outside of the window, yet if that did not cause the injury, and the result was the same as though he exercised the care required, and kept his arm inside, then such want of care, as was said in *Walker v. Westfield*, 39 Vt. 246, did not contribute to produce such injury, and it is the same as though he was without fault.

As the injury occurred, then, the plaintiff was under no legal obligation to assume or anticipate that sticks or a stick of falling cordwood would be projected inside of the window, and cause the accident where it happened. To have his hand and wrist where they were, and where the stick struck them, was where they had a right lawfully to be, and raised no presumption of negligence in law. If such is the case, however strict the rule of contributory negligence may be enforced, can we declare that the negligence of the plaintiff was the proximate cause of the injury, or, in other words, that his want of ordinary care contributed directly to the injury? It is enough to say when the arm is exposed, and the injury occurred on that account, when the facts are admitted, that it is negligence in law. Negligence is generally a question of fact, to be decided by the jury upon all the facts and circumstances, and the court ought not to declare it as a matter of law, unless there is such a plain act of carelessness upon the part of the plaintiff contributing to his injury as makes that a duty. The rule, as it is established by the weight of authority, has not always met with entire approval, and is sufficiently strict and arbitrary, without extending the domain of its operations. In *Spencer v. Milwaukee & P. C. R. Co.*, 17 Wis. 487, the opposite view is ably and forcibly presented by a vigor and fitness of reasoning which it is difficult to answer. The truth is that it is an everyday occurrence for passengers to ride with their elbow on the sill, slightly extending out of the window, though not perhaps outside of the sill. We all know in warm weather, when the windows are up, it is the constant and ordinary habit of passengers of all classes and all degrees of intelligence to so ride; and, judged in the light of our general knowledge and experience, it would be difficult to condemn such conduct as an act so plainly and palpably careless as to require the court to declare it negligence as a matter of law. If the rule is to

No presumption of contributory negligence in case.

obtain as decided by the weight of authority, let it continue to be confined in its operations to injuries which result from exposing the arm to outside obstacles, but let it not be extended to those where the facts are complicated, and the injury, although the elbow was slightly out of the window, did not arise from that fact, or if it had been inside, the arm otherwise preserving its relative position, a like injury would probably have happened. In cases of the first sort it may be conceded, when the facts stand confessed or admitted, that the court may declare the act negligence as a matter of law; *non constat* that it can upon the facts here. In cases of this sort, where the facts are complicated and debatable, where men of ordinary discretion and prudence might differ as to the inferences to be drawn from them in determining the character of the act, it is safer and better to submit them to the jury in connection with all its attendant circumstances, whom the law assumes to be best qualified to dispose of them under proper instructions from the court, than that the court should decide them, as a question of law, by allowing a non-suit. Before the court can do this, and cut off the plaintiff's right to submit his case to the jury, the inferences from the proof ought to be certain and incontrovertible, freeing the mind from all doubt or hesitation; for it must always be borne in mind that it is generally for the jury to determine whether the defendant was negligent, or the plaintiff was contributorily negligent, which as Dr. Wharton has aptly said, is seldom the "subject of direct proof, but an inference from facts put in evidence." The judgment must be reversed, and the non-suit set aside.

Contributory Negligence—Travelling with Arm on Car Window.—See *Quinn v. South Carolina R. Co.* (S. Car.), 37 Am. & Eng. R. Cas. 166; *Breen v. New York C. & H. R. R. Co.* (N. Y.), 34 *Id.* 523; *Hallahan v. New York, L. E. & W. R. Co.* (N. Y.), 26 *Id.* 169; *Dahlberg v. Minneapolis St. R. Co.* (Minn.), 18 *Id.* 202, note 205; *Dun v. Seaboard & R. R. Co.* (Va.), 16 *Id.* 363, note 372; *Germantown Pass. R. Co. v. Brophy* (Pa.), 16 *Id.* 361; *Farrow v. Kelly* (C. C.), 11 *Id.* 104, note 106. See, also, *Coleman v. Second Avenue R. Co.* (N. Y.), 39 *Id.* 456, note 459.

SMITH

v.

GEORGIA PACIFIC R. CO.

(Alabama Supreme Court, January 15, 1890.)

Passenger—Contributory Negligence—Alighting when Name of Station Called.—When the name of a station is called, and soon thereafter the train is brought to a standstill, a passenger may reasonably conclude that

it has stopped at the station, and may endeavor to get off without being guilty of negligence, unless the circumstances and indications are such as to render it manifest that the train has not reached the proper and usual stopping place.

Same—Alighting at Place not a Station—Evidence.—The name of plaintiff's destination was called as usual, and the train was stopped. The point was one at which regular passenger trains met and passed each other, and the stoppage was made with a view to side-tracking the train. On its stopping plaintiff went out of the rear end of the car, and was descending with one foot on the first step on the car and the other about touching the ground when the train moved forward to go to the depot, causing him to fall. The place where the train was first stopped was about 200 yards from the depot building and in a cut. The accident happened during the day time. Plaintiff had been at the place once before, but arrived and departed in the night time and was not about the depot in the day time. *Held*, that, as all the surroundings indicated that the spot at which plaintiff attempted to leave the train was not a proper place for alighting, and as he knew or ought to have known that there was a depot at which passengers got off trains, the injury must be attributed either to accident or to plaintiff's own negligence, and the jury ought to have been instructed to return a verdict for the defendant.

APPEAL from Circuit Court, Cleburne County.

Action by Robert T. Smith against the Georgia Pacific R. Co. to recover damages for personal injuries sustained by plaintiff whilst alighting from one of defendant's trains. Plaintiff appeals from a verdict and judgment for the defendant.

Kelly & Smith for appellant.

Knox & Bowie for appellee.

CLOPTON, J.—Appellant's injuries, for which he sues, were received while alighting from a train at Heflin, a regular station on defendant's road. His right of recovery is founded on the allegation that his injury was caused by the negligence of defendant's servants. The specific negligence complained of is alleged to consist in calling out the name of the station, bringing the train to a standstill immediately thereafter, thereby inducing plaintiff to believe, and to act upon the belief, that the train had reached the usual place for landing passengers, and suddenly starting it without giving him notice. Plaintiff's act in leaving the train being voluntary, it is incumbent on him, in order to entitle him to a recovery, or before the opinion of a jury is required to be taken as to the question of negligence, to produce evidence from which the inference may be reasonably drawn that his injury was caused by the negligence of the defendant. We shall therefore direct our consideration to the question whether, on the facts clearly proved, and having regard to the liberty to draw inferences therefrom, the court would have been justified in taking the question of negligence from the jury, for if on the facts, which admit of no dispute, and allowing

all adverse inferences, it would have been the duty of the court to set aside the verdict, had one been rendered in favor of plaintiff, and the affirmative charge in favor of the defendant was authorized, we need not consider the various rulings of the court. *Bentley v. Georgia Pac. R. Co.*, 86 Ala. 484.

A railroad company, being a carrier of passengers, is under obligation to use reasonable care to transport them safely.

This general duty includes the specific duty not to expose them to unnecessary danger, and not intentionally or negligently mislead them by causing them to reasonably suppose that their point of destination has been reached, and that they may safely alight, when the train is in an improper place. Calling out the name of the station is customary and proper, so that passengers may be informed that the train is approaching the station of their destination, and prepare to get off when it arrives at the platform. The mere announcement of the name of the station is not an invitation to alight, but, when followed by a full stoppage of the train soon thereafter, is ordinarily notification that it has arrived at the usual place for landing passengers. Whether the stoppage of the train after such announcement and before it arrives at the platform, is negligence, depends upon the attendant circumstances. The rule is aptly expressed in *Bridges v. North London R. Co.*, L. R., 6 Q. B. 377, by WILLES, J.: "It is an announcement by the railway officers that the train is approaching, or has arrived at, the platform, and that the passengers may get out when the train stops at the platform, or under circumstances induced and caused by the company, in which the man may reasonably suppose he is getting out at the place where the company intended him to alight. To that extent calling out is an invitation."

Duty of carrier—Announcement of station.

A reference to a few leading cases will aid in the solution of the question whether, on the facts hereafter stated, plaintiff should or could have supposed that the train had reached the usual place for the discharge of passengers.

Authorities examined.

In *Bridges v. North London R. Co.*, *supra*, the executrix and wife sued for injuries suffered by her husband which resulted in his death. The train on which he was a passenger had to pass through a tunnel before reaching the main platform. There was within the tunnel a platform similar to, but narrower than, the main platform. The train went partially up to the main platform and stopped, the last two carriages remaining in the tunnel, the last but one opposite the small platform, and the last, in which the deceased was riding, opposite a heap of rubbish lying near the track. A passenger,

who had alighted on the platform from the carriage next to the last, found the deceased lying on the heap of rubbish fatally injured. There was no light in the tunnel, and it was filled with steam. The name of the station had been called in the usual way. It was ruled, on appeal from the exchequer chamber to the house of lords, that it might be reasonably inferred that the deceased, having heard the name of the station called, and finding that the train had stopped, got out of the carriage supposing that he would alight on the platform, and that the evidence furnished matter on which it was necessary to take the opinion of a jury. L. R., 7 H. L. 213.

In *Central R. Co. v. Van Horn*, 38 N. J. Law, 133, the name of the station which was plaintiff's destination was announced while the train was in motion, and soon thereafter it was brought to a full stop, some distance from the station. The plaintiff went out on the platform of the car for the purpose of alighting, and while standing thereon the train was suddenly put in motion towards the depot, whereby she was thrown off and injured. This was at night. It is said: "The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then to stop the train short of such station, in the night time. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night, this must be the inevitable result."

In *Taber v. Delaware, L. & W. R. Co.*, 71 N. Y. 489, ANDREWS, J., says: "The plaintiff was justified, under the circumstances, in supposing that she had reached her destination, and that the train was at the place where passengers were to alight; at least, the jury might have come to the conclusion that she was free from negligence. The defendant was bound to take notice of the circumstances, viz.: That the station had been announced; that passengers for Willards would naturally assume that the train, when it stopped, was at the station, and at the place where they were to alight; that by reason of the darkness of the night, and the absence of a depot, or other external indication of a station, passengers, especially those not familiar with the surrounding objects, would not, by observation, know that the trains had run beyond the highway crossing; that passengers, in the absence of notice, would, according to the usual custom, start to leave the train as soon as it came to a standstill." In that case the night was dark, and there was no depot or station light or anything to indicate the stopping place, which was a highway crossing, to a person not familiar with it. It was

held that whether notice should have been given to the passengers, as a reasonable precaution, that the train was to back, and whether the omission to do so was negligence, were questions for the jury.

On the other hand, in *Mitchell v. Chicago & G. T. R. Co.*, 51 Mich. 236, 12 Am. & Eng. R. Cas. 163, the plaintiff intended to take another train at the crossing of two railways. Before arriving at the junction, the name of the station was called out, and the train came to a full stop, as required by law, before reaching crossings. Plaintiff hurried to leave the car, went down the steps where there was no platform or other convenience for landing, and as she was stepping off the cars were suddenly started to go forward to the *dépot*, when she fell and was injured. This was in daylight, and it does not appear that any person employed on the train observed her. It was held that the injury was purely accidental, unless plaintiff was herself negligent, and that the company was not liable.

CAMPBELL, J., said: "The only cause of the mischief, leaving defendant's carelessness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore get out. There was nothing at the spot to indicate a landing place, and there was at the proper place, a short distance further on, a building and platform, appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and, from the distances mentioned, we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this."

We have specially referred to the cases cited, because they distinguish between the instances in which the negligence of the defendant is and is not a question for the jury, and have made the foregoing extracts because they clearly declare the principles on which the distinction rests. They all concur that neither the announcement of the station, nor stopping the train before it arrives at the platform, if required by law or usage, for the purpose of avoiding collisions, or other accidents, is negligence *per se*.

In *Bridges v. North London R. Co.*, *supra*, Baron POLLOCK observes, in reference to the conduct of the passenger who was injured: "Had he known the rubbish was there instead of the platform, to jump out onto it with such a fall as would break his

Announcement of station and stoppage of train before arriving at station not negligence *per se*.

leg and occasion mortal internal injuries, would indeed have been negligent and rash in the extreme. But it was two hours after sunset, there was no light within the tunnel, and the deceased was near-sighted, and he might well have supposed he would step on the platform, as did the passenger in the next carriage, with impunity." It will be observed that, in each of the cases in which it was ruled there was evidence of negligence sufficient to have been submitted to the jury, there existed the element that, by reason of the want of light or other things, the passenger may have been deceived into supposing the train had arrived at the platform or place where it was intended he should alight. Comparing all the cases, we deduce that when the name of the station is called, and soon thereafter the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render manifest that the train has not reached the proper and usual landing place.

The undisputed facts are: Heflin was the point at which the regular passenger trains met and passed each other. It was customary for the east-bound train, on which plaintiff was a passenger, to take the side-track, leaving the main track unobstructed for the passage of the train going westwardly. This was necessary to avoid collision. Heflin was plaintiff's point of destination. As the train was approaching the name of the station was called, as was usual, and the train was stopped very soon thereafter, the object being to take the side track. On its stoppage plaintiff went out of the rear door of the car, and was descending, with one foot on the first step of the car and the other about touching the ground, when the train moved to go forward to the depot, which caused him to fall. It was drawn to the usual place for the discharge of passengers and again stopped. The rear of the car, from which plaintiff was getting off, was about 200 yards from the depot building, the proper place for the discharge of passengers. The train was first stopped in a cut about 360 feet long and from 5 to 11 feet deep. This was in daylight, about 1 o'clock P. M. Plaintiff had been in Heflin once before, but, as he states, arrived and departed in the night time, and was not about the depot in day time. Nevertheless he knew, or ought to have known, that there was a depot at which passengers got off and on the trains, and that it was not in such a cut. All the surroundings indicated that the spot at which plaintiff attempted to leave the train was not the proper place for landing. From the description of the place given by witnesses and shown by the diagram in evidence, it is un-

Facts.

**Contributory
negligence of
plaintiff.**

reasonable to conclude or infer that any person possessing the ordinary sense of sight and using it, could have supposed that the train had arrived at the place where the company intended passengers to get off. It does not appear that of those in charge of or employed on the train noticed the plaintiff when leaving it or had cause to suspect his intention to get off. There were no circumstances or surroundings caused by the company which should have induced plaintiff to reasonably suppose he was getting out at the place where the company intended him to alight. The evidence clearly establishes that his injury was accidental, if not produced by his own negligence. On the undisputed facts, the court would have been justified in giving the affirmative charge in favor of defendant.

Affirmed.

Contributory Negligence—Alighting when Name of Station is Called and Train Stopped.—See *Norfolk & W. R. Co. v. Prinnell* (Va.), 30 Am. & Eng. R. Cas. 574, note 577; *Mitchell v. Chicago & G. T. R. Co.* (Mich.), 18 *Id.* 176, note 179; *Edgar v. Northern R. Co.* (Ont.), 16 *Id.* 347; *Pennsylvania R. Co. v. Hoagland* (Ind.), 3 *Id.* 436.

CENTRAL RAILROAD & BANKING CO.

v.

MILES.

(Alabama Supreme Court, November 7, 1889.)

Passenger—Contributory Negligence—Alighting from Moving Train.—When the train stopped at plaintiff's destination, he promptly left his seat and moved towards the door of the car for the purpose of getting off. The train started before he reached the door and was moving when he passed out on the platform. On being informed by a porter that the train was not to stop—or not longer than it had stopped,—plaintiff descended the steps, his left hand holding the side rail, and stepped off in the direction in which the train was moving. He knew there was a bell rope to signal the engineer to stop the train, but did not pull the rope as the train was running so slowly that he did not think there was any danger. The conductor knew that the place was plaintiff's destination. Plaintiff's testimony tended to show that the train was moving at the rate of two and a half or three miles an hour, while on behalf of the defendant, the testimony tended to show that the rate was four or five miles an hour. *Held*, that the question of his negligence was for the jury.

Same—Travelling on Platform.—A passenger who goes upon a platform for the purpose of leaving the train, and who remains there only long enough to ascertain that the train would not stop again, does not violate a regulation prohibiting passengers from travelling upon platforms.

APPEAL from Circuit Court, Bullock County.

Norman & Son for appellant.

Fleming Law and *Tompkins & Troy* for appellee.

CLOPTON, J.—Contributory negligence is relied on to defeat the action, which is brought by appellee to recover for injuries alleged to have been caused by the mismanagement of defendant's train, on which he was a passenger, while in the act of leaving the train. The charges given and refused raise the inquiry whether the attempt of plaintiff to step from a moving car, under the circumstances disclosed by the evidence, was *per se* negligence.

Contributory
negligence—
Alighting
from moving
train.

Undoubtedly, cases do arise in which the facts are so clearly established, and the inference as to the course dictated by ordinary prudence so certain and invariable, that it becomes the duty of the court to take the question from the jury. *Central R. & B. Co. v. Letcher*, 69 Ala., 106, 12 Am. & Eng. R. Cas. 115, is one of this class of cases. Plaintiff was not a passenger. The train was moving from a regular depot, on its accustomed journey, at the rate of five or six miles an hour. The persons in charge were ignorant that plaintiff was on the train. Without request or effort to arrest its progress, he walked out of the car on the platform, and to the rear platform of the next car; descended the steps, with his right hand filled with papers; and jumped off at a right angle,—a manner “almost certain to cause him to fall.” It was held that, under these circumstances, the court should have instructed the jury plaintiff had no right of recovery. In *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600, 37 Am. & Eng. R. Cas. 12, it is said: “Stepping from a moving car, without necessity, when injury is caused thereby, which could have been avoided by remaining on the car,—by the exercise of ordinary care,—is negligence which will defeat a recovery because of prior negligence of the agents or servants of the company.” This general observation had reference to a charge which instructed the jury that plaintiff was not entitled to recover if he was standing on the steps in front of the car, with a keg of lead in his hands, and undertook to step off while it was in motion; and such act was not that of an ordinarily prudent man; and he would not have been injured if he had remained on the steps,—unless the injury was caused wantonly, recklessly, or intentionally. The question of negligence was submitted to the jury; whether or not properly, was not presented or considered. Still, the principle of the decision is that stepping from a moving car, under the circumstances hypothetically stated in the charge, is neg-

ligence. These cases, which are cited by counsel for appellant as supporting their contention, only declare the general proposition that alighting from a car in motion, when the danger is obvious, or without, not absolute, but reasonable, necessity, real or apparent, constitutes contributory negligence, and will defeat a recovery for injury caused thereby.

When the material facts are disputed, or, if clearly established, different inferences may be reasonably drawn therefrom, contributory negligence is a question of fact, exclusively within the province of the jury. This general rule is as applicable to the act of getting off a car in motion as to other cases, unless the court is prepared to lay down an inexorable rule that—except in the well-settled instance of leaping under the impulse of alarm, excited by sudden exposure to great peril—to alight from a moving car is negligence in law in all cases, and under any circumstances.

The undisputed facts are that plaintiff was a passenger, having purchased a ticket for transportation from Union Springs to Inverness; both being regular stations on defendant's road. When the train reached Inverness, Facts. it was] stopped; and thereupon plaintiff promptly left his seat, and moved towards the front door of the car, for the purpose of getting off. The train was started before he reached the door, and was moving when he passed out on the platform; and, on being informed that it was not to stop—or not longer than it had stopped—by a porter, who was standing on the steps, the plaintiff descended the steps, his left hand holding the side rail, and stepped off, in the direction the train was moving. He knew there was a bell rope to signal the engineer to stop the train, but did not pull the rope, as the train was running so slowly he did not think there was any danger. The conductor knew that the plaintiff was a passenger, and that Inverness was his point of destination. There is some variance in the evidence as to the length of time the train was stopped, and as to the rate of speed. The evidence on behalf of the plaintiff tends to show that rate of speed was 2½ or 3 miles an hour,—or, as one witness states, not more rapid than a fast walk,—and, on behalf of the defendant, that the rate was 4 or 5 miles an hour. It is conceded that plaintiff was injured in consequence of stepping from the car; and there is no serious controversy that the train was not stopped a sufficient time to allow plaintiff to get off.

In determining whether there was contributory negligence, the fact that there was a bell rope, and plaintiff's omission to resort to it to stop the train, should not be selected and accorded conclusive or controlling force, but only the weight

to which it is entitled on a consideration of its connection with the other facts, and of the relative bearing and influence of all attendant circumstances, each upon the other. Another and material element of consideration is the effect upon the mind of the plaintiff produced by the failure of defendant to discharge the unquestionable duty to stop the train long enough to permit him, by the use of due diligence, to get off with safety, and by starting it while he was in the act of leaving the train. By the fault or neglect of defendant's agents, he was placed in a situation that compelled him to choose between the delay, trouble, and inconvenience of being carried beyond his stopping place and attempting to step off. The wrongful conduct of the company, whereby plaintiff was subjected to an election between two such courses to be pursued, must be taken into consideration. *Johnson v. West Chester & P. R. Co.* 70 Pa. St. 357. There is a recognized distinction between the cases where the company is and is not in fault. The argument that if plaintiff had remained on the train he would not have been injured, and would have had a right of action for having been carried on, does not, under the circumstances of this case, evoke favorable consideration. Stopping the train at Inverness was tantamount to a direction to the plaintiff to get off, and an assurance that reasonable time would be allowed for that purpose.

The general rule, established by the weight of authorities, is, where the train is stopped at a station to which the company contracted to carry a passenger, the company is liable, if a reasonable time to leave is not afforded, and he is injured in the attempt to alight after it is started and while in motion,—if he does not in getting off, incur a danger obvious to the mind of a reasonable man. 2 Am. & Eng. Encyc. Law, 762. But, notwithstanding the company may be in fault, a passenger is not justified, in order to avoid being carried beyond his stopping place, to defy obvious danger, such as an attempt to jump from a train in rapid motion. But an attempt for such purpose is not negligence in law, if the train was stopped, but not a reasonable time, and is moving so slowly that to alight from it would not appear dangerous to a man of ordinary prudence. The plaintiff may or may not have been negligent. Whether negligent or not, depends upon the attendant circumstances,—the manner in which he descended the steps of the car and stepped off, the rate of speed at which the train was running, the character of the ground, the situation, and other circumstances, if any, calculated to render the attempt dangerous. As plaintiff was not at fault in starting to leave the train, the inquiry is, did he exercise ordinary care in stepping from the

Reasonable
time to leave
train.

car after he discovered it was in motion? Under the circumstances disclosed by the evidence, this inquiry was properly submitted to the jury. Different minds may reasonably draw different inferences from the undisputed and the controverted facts. *Strand v. Chicago & W. M. R. Co.* (Mich.), 28 Am. & Eng. R. Cas. 213; *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494; *Raben v. Central Iowa R. Co.* (Iowa), 31 Am. & Eng. R. Cas. 50; *Ingalls v. Bills*, 43 Am. Dec. 364; 2 Wood, Ry. Law, 1130-1145.

Appellant further insists there was contributory negligence on the part of plaintiff, consisting in riding on the platform while the train was moving, in violation of a regulation of defendant. In *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112, 18 Am. & Eng. R. Cas. 194; it was held that such a regulation is reasonable, and that a passenger who is injured while standing on the platform of a car in motion in violation of the regulation, cannot maintain an action to recover damages for such injury. In that case, the plaintiff went on the platform when the whistle was sounded, half a mile from the station at which he intended to get off, and remained thereon until the train passed the depot, when he was precipitated or fell. In this case, plaintiff went on the platform, for the purpose of getting off, after the train was stopped, and remained thereon only long enough to ascertain that it was not going to stop any longer. The platform is the only mode of egress from the car; and, if there was no negligence in undertaking to get off, certainly it was not negligence to use the only means provided by the company for doing so. Plaintiff was not riding on the platform, in the meaning of the regulation.

Travelling on
platform.

PENNSYLVANIA R. Co.

v.

LYONS.

(Pennsylvania Supreme Court, November 15, 1889.)

Passengers—Reasonable Time for Alighting—Conflicting Evidence—Province of Jury.—Where the evidence as to the time which a train stopped at a station is conflicting, plaintiff's witnesses having testified that it stopped from 10 to 20 seconds, and defendant's witnesses that it stopped a minute and that from 10 to 15 passengers, mostly ladies, got off the train, and one or two passengers got on it while it was at rest, the question whether the train stopped a reasonable and proper time to allow passengers to alight safely is for the jury.

Same—Instructions.—When a passenger is placed in peril by the default or negligence of the company, or when he leaves the train while it is in motion by direction of the company's agent, it is for the jury to say upon the evidence, whether the act was negligent or not; and where there is evidence tending to show that a train was not stopped a reasonable time to allow passengers to alight, an instruction that even if the train did not stop a sufficient time to allow plaintiff to leave it, yet he should not have jumped off after it started and his doing so was such contributory negligence on his part as will prevent a recovery, is properly refused.

Same—Delay in Leaving Train—Instruction.—Where the evidence whether a train was stopped at a station a sufficient time to permit a passenger to leave it is conflicting, and the defendant requests an instruction that even if the train did not stop a sufficient time to allow the passenger to leave it, yet it was contributory negligence to jump off after it started, it is error for the court to say, in refusing the instruction, that the question whether it was contributory negligence to leave the train whilst in motion depends altogether on the speed that the train was under at the time, and that it must be left to the jury, as such an instruction authorizes a recovery even though the plaintiff may have been guilty of negligence in delaying to leave the train.

Same—Evidence—Admissibility—Res Gestae.—Where a passenger sues for damages for personal injuries caused by a fall whilst alighting from a train, a declaration made by him immediately after the train passed while he lay on the platform where he fell is admissible as a part of the *res gestae*.

ERROR to Court of Common Pleas, Philadelphia County.

Action by Thomas Lyons against the Pennsylvania R. Co. to recover damages for personal injuries sustained by plaintiff whilst alighting from one of defendant's trains. Defendant brings error to review a verdict and judgment for the plaintiff. The first error assigned by the defendant was the admission in evidence of a declaration made by the plaintiff whilst he was lying on the platform where he fell. The following instructions were requested by the defendant: "(1) Where a railway train does not stop at a station to which it has agreed to carry a passenger, or does not stop a sufficient

time to allow him to alight, it is the duty of the passenger to remain upon the train, and not to attempt to jump off. Therefore, even if the train in this case did not stop a sufficient time to allow the plaintiff to leave it, yet he should not have jumped off after it started, and his doing so was such contributory negligence upon his part as will prevent a recovery in this case." To which the court answered: "My answer to that proposition is that, as a general rule, if a passenger is about to be carried beyond a point at which he was entitled to get off the train, by reason of the train not stopping, or if the train starts before he has a reasonable time to get off the train, to jump off that train when it has attained any considerable speed or momentum is an act of carelessness *per se*, which would defeat any man's right of action—to show that, after the train had got under headway, and was going at any considerable rate of speed, he undertook to jump off from the platform. I do not affirm this proposition in the breadth in which it is put to me. I do not say that, when a train is just beginning to move,—when it is in motion, but just starting, if slightly,—a passenger would be guilty of contributory negligence by stepping off under such circumstances as that; but if a train is in motion, under headway, and a passenger attempts to jump off, it is contributory negligence which would defeat right of recovery." This constituted the second assignment of error. "(2) If the jury believe that the train had stopped a sufficient time for the plaintiff to leave it, upon the platform where passengers leaving the defendant's cars usually land, and then started upon its course, and that the plaintiff then jumped from the platform or steps of the car, he was guilty of contributory negligence and cannot recover." The court answered: "I say to you upon this point, in connection with the other point, that in every case it must be left to the jury to say whether, under the circumstances of the case, as it is presented to them, the plaintiff is guilty of contributory negligence. In cases like the one before us, such as referred to in the point here, it is for the jury to say whether, under the circumstances, the plaintiff was guilty of contributory negligence in stepping off the car when it was in motion. My own view of it is that it depends altogether on the speed or rate of motion that the train is under at the time a passenger attempts to step off. I do not say, if a train has just begun to move, that it is contributory negligence to step off a car; but in all cases it must be left for the jury to say, according to the proof as to how the train was moving at the time that the passenger attempts to jump off. The jury are to determine whether it was contributory negligence in him to get off, under the circumstances of that

special case." This was made the third assignment of error. "(3) The evidence shows that the plaintiff was guilty of such contributory negligence as will prevent his recovery in this action, and the verdict must be for the defendant. (4) There is no evidence of negligence upon the part of the defendant, and the verdict therefore must be for the defendant. (5) Under all the evidence in the case, the verdict must be for the defendant." The fourth, fifth, and sixth assignments of error were founded upon the refusal of these points.

George Tucker Bispham, (*John Hampton Barnes*, of counsel,) for plaintiff in error.

William Henry Sutton for defendant in error.

McCOLLUM, J.—The plaintiff below was a passenger on a train of the Pennsylvania Railroad Company, from Philadelphia to Haverford College station, on the evening of the 6th of April, 1886. In alighting from the car at the latter place he fell upon the platform of the station, and was injured. Alleging that the injury he received was caused by the unassisted negligence of the company, he brought this action to recover compensation for it. His claim is that the train did not stop long enough to allow him to get off the car safely. It was the duty of the company to give him a reasonable time to leave the train at the place of his destination, and it was his duty to use reasonable diligence and care in getting off there. It clearly appears that the train was moving when he left it, but whether he fell or voluntarily jumped from it is not clear, because the evidence on this point is conflicting. As the alleged failure of the company to stop its train long enough to enable the plaintiff to leave it in safety constitutes the negligence complained of, it follows that, if the company was not in default in this particular, it is not liable to the plaintiff for the injury he received. The testimony on the part of the plaintiff is that the train stopped from 10 to 20 seconds; on the part of the defendant, that it stopped a minute, and that from 10 to 15 passengers, mostly ladies, got off the train, and one or two passengers got on it, while it was at rest. It is contended that upon this evidence the court should have directed a verdict for the defendant, upon the ground that no negligence was shown, and its refusal to do so constitutes the fifth specification of error.

**Reasonable
time to alight
—Province of
jury.**

We have no hesitation in deciding that this refusal was right, and that it was for the jury to determine, upon the whole evidence, whether the train stopped a reasonable and proper time to allow its passengers to alight safely. What is a reasonable time depends on the circumstances of the case as developed by the proofs.

It is further contended that if the defendant company failed to afford the plaintiff a reasonable time to leave the car safely, he was guilty of contributory negligence in getting off while it was moving. It is admitted that the plaintiff got off the car while it was running upon the track and the general rule that it is negligence in a passenger to jump from a moving train is not seriously questioned. But to this general rule there are exceptions. When the passenger is placed in peril by the default or negligence of the company, or when he leaves the train while it is in motion, by direction of the company's agents, it is for the jury to say upon the evidence whether the act was negligent or not. In such cases, all the circumstances, including the speed of the train at the time of leaving it, must be considered. *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Pennsylvania R. Co. v. Peters*, 116 Pa. St. 206, 30 Am. & Eng. R. Cas. 607; *Delaware & H. Can. Co. v. Webster*, (Pa.) 27 Am. & Eng. R. Cas. 160; *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357. In view of the evidence in the case, and the principles already stated, the denial of the defendant's first, third, and fifth points was proper and the specifications founded on such denial are dismissed.

Contributory
negligence—
Alighting
from moving
car.

The answer to the defendant's second point was erroneous and misleading. It did not, in terms, affirm or refuse the point, but it substantially denied any effect to a finding by the jury that the train stopped a sufficient time for the plaintiff to leave it, and that he jumped from it after it had started upon its course; and it declared that in all cases it was for the jury to determine whether it was negligence in a passenger to jump from a moving train, and that this depended altogether upon the speed of the train when he jumped from it. We cannot accept this as a correct statement of the law on the subject to which it relates. If a passenger in alighting from a railway car, receives an injury which he alleges was caused by the neglect of the company to stop its train long enough to enable him to leave it safely, he must prove such neglect to the satisfaction of the jury, or fail in his action. When, therefore, it was found that sufficient time was given him to get off in safety, that he did not do so, but remained on the train until it had started upon its course, and then jumped from it and was injured, a clear case of injury arising from his own negligence is presented, and he cannot recover. In the present case, as we have seen, it was for the jury to determine whether a sufficient time was allowed the plaintiff to alight from the car before it started on its course, and this involved a consideration of all the circumstances of the case; but if it was ascertained that sufficient time had

been given for that purpose, that he did not use it, but remained upon the car until it was in motion, and then jumped from it and was injured, the jury should have been instructed that his own negligence caused the injury and prevented a recovery. This was the instruction the defendant's second point sought, but failed to obtain. A sufficient time in such cases, means time to alight safely, in the use of reasonable diligence and care, and has regard to all the circumstances which affect the act of getting off a train. The third specification of error is sustained.

We cannot say that it was error to receive the declaration made by the plaintiff immediately after the train passed, while he lay on the platform where he fell. It was, under the authorities, a part of the *res gestae*. *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Elkins v. McKean*, 79 Pa. St. 493. It differs from the declaration which was rejected in *Ogden v. Pennsylvania R. Co.*, 23 W. N. C. (Pa.) 191, as that was made after the removal of the injured party from the place where he was found. In this case it was made while the party was lying where he fell, and an instant after his fall. The first specification of error is not sustained. Judgment reversed, and *venire facias de novo* awarded.

Passengers—Reasonable Time To Alight From Train.—See *Covington v. Western & A. R. Co.* (Ga.), 34 Am. & Eng. R. Cas. 469; *Raben v. Central Iowa R. Co.* (Iowa), 33 *Id.* 520, note 523; *Pennsylvania R. Co. v. Peters* (Pa.), 30 *Id.* 607; *Strand v. Chicago & W. M. R. Co.* (Mich.), 28 *Id.* 213; *Nichols v. Dubuque & D. R. Co.* (Iowa), 27 *Id.* 183; *Hannibal & St. J. R. Co. v. Clotworthy* (Mo.), 21 *Id.* 371; *Edgar v. Northern R. Co.* (Ont.), 16 *Id.* 347, note 350; *Swigert v. Hannibal & St. J. R. Co.*, 9 *Id.* 322; *Jewell v. Chicago, St. P. & M. R. Co.* (Wis.), 6 *Id.* 379; *Straus v. Kansas City, St. J. & C. B. R. Co.* (Mo.), 6 *Id.* 384; notes 39 *Id.* 452, 37 *Id.* 85, 18 *Id.* 188.

LOUISVILLE & NASHVILLE R. Co.

v.

CRUNK.

(119 *Ind.* 542.)

Personal Injuries—Pleading—Motion to Make More Specific.—Where the plaintiff sues to recover damages by reason of the negligence of the defendant in suddenly accelerating the speed of a train whilst he was alighting from it, a motion to require the plaintiff to make the complaint more specific by stating what agent or employe of the defendant caused the motion of the train to be accelerated and what acts of such agent caused the accelerated motion, is properly refused, such facts being peculiarly within

the defendant's knowledge, and the pleading being construed in view of the general knowledge of the manner of running trains. **Same—Special Findings and General Verdict—Inconsistency.**—The special findings in an action for injuries sustained whilst leaving a train, showed the plaintiff, who was rightfully upon it, got on the lower step of the platform for the purpose of alighting when the train was moving at the rate of four and a half miles an hour. The jury also found specially that neither the conductor nor engineer in charge of the train knew that plaintiff was on the steps of the car or that he proposed leaving it, or that he was in the act of alighting at the time when he attempted to leave it. **Held.** that as the special findings showed that the conductor knew the plaintiff was on the train but did not know he was in the act of alighting when he made the attempt to leave it, there was no such conflict between the special findings and a general verdict for the plaintiff as required the latter to be set aside.

Personal Injuries—Duty to Person Assisting Sick Passenger.—If a railroad company agrees to receive upon its train a passenger who is so sick and feeble as to render it necessary for him to be carried into the car, and the conductor had knowledge of the fact that a person entered the car as an assistant in carrying the passenger into it, the company owes such person the same duty, while he is rendering assistance to the passenger and while he is leaving the car, that it owes to any of its passengers for hire.

Same—Reasonable Opportunity to Leave Train.—If a person rightfully enters a car to assist in carrying a sick passenger, and the conductor knows or ought to have known that such person had entered the car, it is the duty of the railroad company to cause the car to remain stationary such length of time as is reasonably sufficient to enable the assistant to leave the car while it is standing; and if the train is started before a reasonable time has elapsed, and the assistant attempts to leave the car while in motion but while the motion was slow and a person of ordinary caution and prudence would apprehend no danger in leaving, and if, when he was in the act of stepping from the car to the station platform, the motion of the train is suddenly increased by the fault or negligence of the company's employees and such person is thereby thrown down and injured, he is entitled to recover.

Same—Contributory Negligence—Leaving Moving Train.—An attempt to voluntarily leave a moving train is not negligence *per se*.

APPEAL from Circuit Court, Vanderburgh County.

Action for damages. Defendant appeals from a judgment for the plaintiff.

Shackleford & Vance and *W. J. Wood* for appellant.

A. P. Hovey, G. V. Menzies and *William Loudon* for appellee.

OLDS, J.—This is an action by the appellee against the appellant for damages resulting from injuries to the appellee by reason of the negligence of appellant's employes in failing to stop a passenger train at a railway station a sufficient length of time to allow appellee to get off in safety, and in suddenly accelerating the speed of the train when appellee was in the act of stepping off. As some question is made as to the negligence charged in the complaint, we state the principal comments, which are as follows: "That the defendant before and at the time of the grievances com- Complaint.

plained of was, and now is, the owner of a railroad known as the 'Louisville & Nashville Railroad,' running from the city of Evansville, Ind., by and through the city of Mt. Vernon, Ind., and other cities and towns, to the city of St. Louis in the state of Missouri, and with their locomotive engines and trains of cars moved and propelled by steam, were at said time engaged in carrying and conveying passengers over said railroad for hire; and said defendant, on the 13th day of December, 1885, agreed and undertook for hire to carry over their said railroad as a passenger one George Naas, from said city of Mt. Vernon to said city of St. Louis; that said Naas was at said time from long protracted sickness so weak and infirm in body as to be unable to rise from his bed without assistance, of which sickness and infirmity of the said Naas the defendant at the time aforesaid had due notice; that by reason of said infirm and feeble condition of said Naas it was at said time necessary for him to be carried from the station of the defendant at Mt. Vernon, and placed upon the cars of the defendant for the purpose of commencing said journey to St. Louis; that the plaintiff, with other friends of said Naas, undertook to assist in carrying said Naas at said time from the station of the defendant at Mt. Vernon, and to place him upon their cars at the time ready for the reception of passengers at said place, the defendant at the time agreeing with and promising said Naas—of which agreement and promise the plaintiff had knowledge before he took upon himself said charge and burden aforesaid—that the defendant would stop its locomotive engine and cars at said station a sufficient length of time, not only to permit the said Naas to be carried aboard the said cars by the plaintiff and other friends of said Naas, but also a further time sufficient for the plaintiff and other assistants to leave the cars in safety; that upon the arrival of said defendant's train of passengers cars at their station at Mount Vernon on said day, none of the defendant's servants, agents, or employes aided or offered to aid in carrying said Naas on board of the said defendant's cars, and thereupon this plaintiff, with the assistance of two other friends of said Naas, relying upon said promise and agreement of said defendant so made with said Naas, and by him theretofore communicated to plaintiff, forthwith proceeded, in the presence and view of the defendant's agents and servants who had charge and control of said train, to carry, and did with the utmost dispatch carry, said Naas from said station, and place him upon one of the cars of the defendant, to be by the defendant carried as a passenger over their said railroad to said city of St. Louis, in pursuance of their agreement; that upon placing said Naas on board of said car the

plaintiff and said other assistants immediately thereafter proceeded to leave said cars without delay; that the defendant caused their said locomotive engine and train of cars to be slowly moved forward at the instant the plaintiff and the other assistants began leaving said car; that said other assistants stepped from said car upon defendant's platform at said station while said cars were slowly moving forward as aforesaid, without difficulty, and without injury; that he (the said plaintiff) was following so closely behind said other assistants when they so stepped off that he could easily have laid his hand upon them, and was making reasonable haste in getting off said car, as the defendant then and there well knew, but at the instant he was in the act of stepping off the lower step of the platform of said car upon the platform of said station the defendant negligently and wrongfully caused the motion of said car to be suddenly and greatly accelerated, by reason whereof the plaintiff was, without any fault or negligence on his part, thrown violently upon and from the platform of said station and upon the track of the defendant's railroad, and the said cars of the defendant, without any fault or negligence on his part, ran upon and over his right foot and ankle, crushing the bones thereof to such an extent as that four of his toes had to be amputated." Then follow further allegations as to the nature and extent of the injury. There was a demurrer filed to the complaint, and overruled, and the ruling assigned as error, but it is not discussed by counsel, and is therefore waived.

The appellant filed a motion to require the appellee to make the complaint more specific by stating and showing what agent or employe of the defendant caused the motion of the cars to be suddenly and greatly accelerated, and what acts of such agent caused the motion of the cars to be suddenly and greatly accelerated. Also that he be required to show how or in what respect such acts of said agents were negligent and wrongful. This motion was overruled, and is complained of as error. This motion was properly overruled. The pleading must be construed with the light and knowledge possessed by mankind of the manner and by whom passenger trains are run and operated, and the allegations of the complaint are to be treated as relating to and meaning the employes and agents of the defendant running and operating the train of cars, and was sufficiently certain and specific. Furthermore, the plaintiff is not bound to plead facts which are peculiarly within the knowledge of the defendant.

The appellant moved for judgment in its favor on the special findings, notwithstanding the general verdict. This mo-

Motion to
make com-
plaint more
specific.

tion was overruled, and the ruling assigned as error. The answers to interrogatories showed the following facts: That the plaintiff went upon the train to assist Naas, at the request of the family; that the train was in motion before plaintiff left the car in which Naas was seated, and when he was upon the platform and step for the purpose of leaving the train, and that plaintiff knew it was in motion; that the train was moving at the rate of four and one-half miles an hour when plaintiff got on the lower step for the purpose of alighting from the train. The answers to the fourth and fifth interrogatories are conflicting. The fourth interrogatory and answer are to the effect that neither the conductor nor engineer in charge of the train and engine knew that plaintiff was on the steps of the car, or that he proposed leaving the train, or that he was in the act of alighting from the train at the time he did attempt to leave it. Interrogatory five and answer are to the effect that the conductor knew the plaintiff was on the train when it started, and that he proposed to leave the train before he had left it. This leaves the interrogatories showing this state of facts, viz: That plaintiff went upon the train to help Naas at the request of Naas' family; that the train was in motion before he left the car, and continued in motion until plaintiff got on the step for the purpose of leaving, and that he knew the train was in motion; that when he was upon the lower step for the purpose of alighting from the train, the train was moving at the rate of four and one-half miles an hour, and that the conductor knew plaintiff was on the train, but did not know he was upon the steps of the car, or was in the act of alighting when he made the attempt to leave the train. The answers to interrogatories did not entitle the appellant to judgment. It is only where there is a direct conflict between the general verdict and the interrogatories and answers thereto, and where the facts found by the answers to the interrogatories entitle the party in whose favor they are to a judgment, that a motion for judgment on the answers to interrogatories, notwithstanding the general verdict, will be sustained. *McClure v. McClure*, 74 Ind. 108; *Grand Rapids & I. R. Co. v. McAnnally*, 98 Ind. 412. In the case of *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88-96, 23 Am. & Eng. R. Cas. 390, it is held that all reasonable presumptions are indulged in favor of the general verdict, while nothing will be presumed in favor of the special findings. Under these well settled principles, which have been universally adhered to by this court, there was no error in overruling appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict. All the facts established by the an-

General ver-
dict and spe-
cial findings.

ers to the interrogatories might be true, and yet the ap-
pellee entitled to recover.

It is insisted by counsel for appellant that the answers to
interrogatories show that the train of defendant was in mo-
tion before the plaintiff left the car in which said
Na was seated, and when the plaintiff came upon
the platform of said car, and when he got on the
steps of said car for the purpose of leaving it, as
was known to him, and that when plaintiff reached

Leaving mov-
ing train—
Contributory
negligence.

the lower step for the purpose of alighting from the train, it
was moving at a speed of four and one-half miles per hour,
and that the law is that when a railroad station has been an-
nounced, and the train has been stopped, that is an invitation
to passengers to alight, and an implied promise and an obli-
gation that the stop shall be long enough to give all passen-
gers a reasonable time to leave the train in safety; but after
the train has started from the station, and especially when it
has attained a speed which proclaims to every one that the
movement is final, there is no longer an invitation to any one
to leave the train, and one who thus attempts to leave it does
so without the invitation or consent of the railroad company
and at his own risk. That the effect of the finding in this
case was that the train had acquired such speed at the time
the appellee alighted as to proclaim to every one that the
movement was final, and that the alighting under such cir-
cumstances is conclusive presumption of contributory negli-
gence, and the appellee cannot recover: and it was the duty
of the court to render judgment in favor of appellant. That
when the facts show the train to have been moving at the
rate of four and one-half miles an hour when a person alights
from the train, that the court shall declare as a matter of law
that such act of alighting is negligence, and that the person
cannot recover, though injury may have resulted to him by
reason of the negligence of the employes of the railroad com-
pany. We do not concur in this theory of counsel. The fact
that a person voluntarily alights from a moving train is not
a conclusive presumption of negligence on his part. The
rate of the speed the train has acquired, the place, and all the
circumstances connected with the alighting, are to be taken
into consideration in determining whether or not the person
was guilty of negligence on his part in leaving or attempting
to leave the train. The degree of speed which would of it-
self make the person guilty of negligence in one case, and
under some circumstances, would not under others. We do
not mean to say that the court would not hold that a person
who voluntary left a passenger train when in full speed was
not guilty of negligence, and that such act alone would be

construed to constitute such contributory negligence as that he could not recover for injuries received; but, like crossing the railroad track, while it might be negligence to attempt to cross the track with horses and vehicle when the train was within a few rods, running at high speed, it might not be when the train was at a much greater distance, and running at a less rate of speed, though it was in sight. It might be negligence to attempt the crossing of a track with horses and vehicle when it would not be to do so on foot. So, too, what one in the full vigor of manhood might do with perfect safety might be hazardous for one who is decrepit with age, or in an enfeebled condition. Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the cause, taking into consideration all the circumstances in connection with the alighting. In this case, the passenger, Naas, being in an enfeebled condition, requiring the assistance of others to carry him upon the train and place him in a seat; the defendant's employes, having knowledge of his condition, and observing others carrying him into the car, owed an obligation to those assisting and carrying him into the car to allow the train to remain standing a sufficient time to allow them a reasonable opportunity to leave the train; and to those whose assistance was necessary, and whose services in that behalf were accepted by the passenger, Naas, the company owed the same duty in allowing them a reasonable time to leave the train as it would had they been passengers upon the train, though they voluntarily offered their services. In the case of *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441, at page 447, the court, in speaking of a person leaving a train while in motion, says: "If the leap was made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the defendant from the responsibility otherwise resting upon it;" and this statement of the law by the court is quoted and approved in the case of *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48. In the case of *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, 5 Am. & Eng. R. Cas. 554, the court states the rule as to when the question of negligence should be submitted to a jury. See, also, *Pennsylvania Co. v. Long*, 94 Ind. 250, 15 Am. & Eng. R. Cas. 345; *Town of Albion v. Hetrick*, 90 Ind. 545.

The first cause for new trial assigned was the giving by the court, at the request of the plaintiff, instructions 1, 2, 3, and 5. We set out some of the instructions. No. 1 is as follows: "If you believe from the evidence that at the time mentioned in the complaint the defendant, for hire, agreed to re-

ceive, and did receive, on board its train of cars at its passenger station, at Mt. Vernon, Ind., one George Naas as a passenger, and that the defendant had knowledge that said Naas was at the time so sick and feeble as to render it necessary for him to be carried into defendant's car, and the conductor of said train then present had knowledge or had reasonable grounds to believe that the plaintiff entered said car as an assistant in carrying said Naas therein, and in seating said Naas in said car, then you may find that the plaintiff rightfully entered said car, and that the defendant owed the plaintiff the same duties, while he was rendering said assistance to said Naas, and while he was leaving said car, that it would owe to any of its passengers for hire." This instruction was proper. The defendant, in contracting to carry the passenger, Naas, in his sick and enfeebled condition, contracted an obligation which could only be carried out by Naas being carried upon the train and seated in the car. By thus contracting to carry Naas as a passenger it took upon itself the obligation of allowing him assistants to place him upon the train, and seat him in the car, and the compensation received by the defendant for conveying Naas from Mt. Vernon to his destination included as well the right to have assistants place him in the car as the carrying him after being so placed in the car, and the defendant owed the same obligation to his assistants while necessarily entering and leaving the car with Naas as it owed to Naas himself. Instruction No. 2 states the legal obligation of carriers of passengers for hire, and is not erroneous, in connection with the other instructions. Instruction No. 3: "If you find from the evidence in this case, and under the instructions I have given you, that the plaintiff rightfully entered the car at its station at Mt. Vernon as an assistant in carrying said Naas into said car, and the conductor of the train of which said car was a portion, knew or ought to have known at the time that the plaintiff had in the capacity of such assistant, entered said car, then you should find that it was the duty of the defendant to cause said car to remain stationary at said station such a length of time as would, in your judgment, under all the circumstances proved, be sufficient to enable the plaintiff to leave the car while it was thus standing; and if you find that the train was started by defendant before such reasonable time had elapsed, and that the plaintiff attempted to leave the car while in motion, but while the motion thereof was yet slow, that a person of ordinary caution and prudence would apprehend no danger in stepping therefrom, and that when the plaintiff was in the act of stepping from the steps of the car platform to the station

Obligation of
carrier to per-
sons assisting
passengers.

platform, if you should so find the motion of the train was suddenly increased by the fault or negligence of the employes of said road, and that by reason of such sudden increase of speed the plaintiff was thrown onto the track of the defendant and received the injury complained of, you will find for the plaintiff, unless you further find that he was guilty of want of ordinary care and prudence, which directly contributed to produce the injury." This was a proper instruction, and is applicable to the issues in the case. The complaint alleges the contract to carry Naas in his sick and enfeebled condition, the necessity of assistants, and knowledge of such facts on the part of the defendant; that the plaintiff entered the car as an assistant of Naas; and it fairly appears that the train failed to remain standing a sufficient time for the plaintiff and other assistants to leave the car, and that it moved slowly as plaintiff was leaving the car, so that he could have alighted in safety had it not been for the fact that when he was upon the step, in the act of alighting, there was a sudden acceleration of speed, caused by the negligence of the employes of defendant operating and running the train, by reason of which plaintiff was thrown violently upon and from the platform and upon the track, and run over, without fault on his part; and this instruction is based upon the same theory,—that if the plaintiff rightfully entered upon the car as an assistant of Naas, and the conductor knew it, or had reason to know it, that he should have allowed the train to remain stationary a sufficient length of time for plaintiff to have left the train, and if he failed to do so, and started the train slowly, and continued to run so slowly that a person of ordinary prudence and caution would have apprehended no danger in stepping therefrom, and while the car was thus moving, and the plaintiff was in the act of stepping off onto the platform of the depot, the employes, carelessly and negligently, suddenly accelerated the speed of the car, and by reason of such sudden increase of speed plaintiff was thrown onto the track of the defendant, and received the injury complained of, defendant would be liable, unless the lack of ordinary care or prudence of plaintiff directly contributed to the injury. The fifth instruction states the law properly as to the amount of recovery in the event the jury find for the plaintiff, and is not erroneous.

The next error assigned is the refusal of the court to give instructions 1, 2, and 8, requested by the defendant. They all proceed upon the theory that if the plaintiff knew the train was in motion, and, to avoid being carried from Mt. Vernon, attempted to leave the train, and such attempt caused or contributed to the injury, he had no right to recover.

We cannot adhere to the doctrine that the attempt to voluntarily leave a moving train, regardless of the speed and circumstances under which the attempt is made, is negligence *per se*, and, if injury occurs in alighting by reason of the negligence of the employes of the railroad company, that there can be no recovery. Though that doctrine has been held in some cases, yet it is in opposition to the decisions of this court heretofore cited, and we think against the best considered cases of other states. In the case of *New York, P. & N. R. Co. v. Coulbourn*, 69 Md. 360, the court says: "The court rejected the defendant's fourth prayer, and in so doing we think it committed no error. By that prayer the court was asked to instruct the jury that if they should find that the car was moving at least at the rate of five miles an hour at the time the plaintiff jumped therefrom, then such act of the plaintiff was negligence on his part, and their verdict should be for the defendant. This prayer excluded from consideration all the facts and circumstances of the case under which the plaintiff acted, except the single fact that he jumped from the car when it was moving at the rate of five miles per hour; and, if the jury should find that fact, then the court was asked to say, as matter of law, there was such negligence on the part of the plaintiff as would preclude his right to recover, without regard to the other facts of the case; but, in our opinion, all the facts and circumstances of the case were properly left to the consideration of the jury, and it was for them to determine as matter of fact whether the plaintiff in jumping from the car acted as a reasonably cautious man would do under like circumstances." *Cumberland Val. R. Co. v. Maugans*, 61 Md. 53, 18 Am. & Eng. R. Cas. 182; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Clemens v. Hannibal & St. J. R. Co.*, 53 Mo. 366; *Delamatyr v. Milwaukee & P. C. R. Co.*, 24 Wis. 578; *Strauss v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384.

Leaving moving train not negligence *per se*.

It is proper to consider the further question as to whether there was evidence to support the verdict of the jury, and whether the charges given by the court were applicable to the evidence. We have examined the evidence. There was evidence from which the jury might have reasonably found that Naas was sick and in such a feeble condition as to require assistants to carry him on board the cars; that defendant's employes had knowledge of his condition at the time of selling him a ticket and contracting to carry him, and that the conductor was notified and saw the assistants carrying him to the cars, and

Sufficiency of evidence—Instructions.

was directed by the agent to give plenty of time; that no time was given the assistants to leave the train; that the train was in motion by the time Naas was seated; that the train moved slowly until plaintiff was on the steps and in the act of stepping from the train, when the speed was suddenly increased. Some witnesses describe it as moving with a lunge; others, with a sudden motion; others, that it started suddenly, and that the other assistant, just in front of plaintiff, landed safely; and it may have been fairly found that the suddenly increased motion of the car threw the plaintiff upon the track, and, had it not been for that, he would have landed safely, and that the employes were guilty of negligence in so moving and running the train. There is no error in the record for which the judgment should be reversed. Judgment affirmed, with costs.

Passenger—Reasonable Time to Alight—Negligence.—Plaintiff, a passenger on a railroad train, sat near the front door of the car, and as soon as the train stopped at his destination he arose from his seat and proceeded to leave the car by the front door. When he had placed one foot on the last or lowest step and was proceeding to step off the car with the other foot which was on the next step above, he was, by a sudden jerk in starting, thrown to the ground and one of his feet was run over and crushed. *Held*, that as it was the duty of the company to give its passengers reasonable opportunity to leave its train at the station, the evidence was sufficient to sustain a verdict for the plaintiff. *McDonald v. Long Island R. Co.*, N. Y. Ct. App., Second Div., November 26, 1889.

Injuries to Persons Assisting Passengers to Board Cars.—A person who enters a car for the purpose of assisting a passenger to obtain a seat, does not sustain such a relation to the company as imposes on it any extraordinary care, and it is not bound to give him special notice of the time of the departure of the train. If the company exercises ordinary care it is all that is required of it. *Coleman v. Georgia R. & B. Co.* (Ga.), 40 Am. & Eng. R. Cas. 690; *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.), 64; so long as it has no knowledge that such person is aboard the train. *Griswold v. Chicago & N. W. R. Co.* (Wis.), 23 Am. & Eng. R. Cas. 463. But in *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, it was held that a person who did not intend to embark as a passenger, but who had in charge a lady and her infant child who did so embark, was entitled to have sufficient time to escort the lady to her seat, and that if the time of stopping was too short, or if the agent of the road failed to give the usual notice of the stopping of the train, there was not an exercise of such ordinary care as the company was bound to employ. If a person boards the train for such purpose and attempts to leave it after it is in motion and under such circumstances as necessarily to expose himself to the risk of injury, he takes the risk of alighting while the train is in motion. *Central R. & B. Co. v. Letcher* (Ala.), 12 Am. & Eng. R. Cas. 115; *Coleman v. Georgia R. & B. Co.* (Ga.), 40 *Id.* 690; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Lucas v. New Bedford & T. R. Co.*, 6 Gray (Mass.), 64; *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27.

JONES

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(Minnesota Supreme Court, December 20, 1889.)

Passengers—Alighting from Moving Train—Conductor's Orders.—It is negligent and unwarrantable conduct on the part of a conductor in charge of a train to notify or advise a passenger to leave the train while in motion, under circumstances likely to expose him to accident or injury.

Same—Contributory Negligence—Presumption.—Unless a train is moving very slowly, and the circumstances are especially favorable, it is *prima facie* negligence for a passenger to attempt to alight or jump from a moving train. The circumstances may, however, be such as to render the question a proper one for the jury. He may be justified, in any particular case, in relying upon the superior knowledge of the conductor as to the speed and movements of the train, and other circumstances, and in following his directions, particularly when notified to act promptly, to prevent being carried beyond a station.

APPEAL from District Court, Faribault County.

Andrew C. Dunn, (*H. H. Field* of counsel,) for appellant.

Lovely & Morgan, *S. J. Abbott*, *D. F. Morgan* and *W. J. Trask* for respondent.

VANDEBURGH, J.—The plaintiff purchased a ticket at Wells for Winnebago City—towns on the line of the defendant's railway—took passage on a freight train, entered the caboose in the evening, fell asleep, and was asleep when the train arrived at Winnebago City. He did not wake up in time to get off while the train was stopping at the latter place; but, just as it was leaving, the conductor came into the caboose, and, according to the plaintiff's testimony, awakened him, asking: "Where are you going?" *Answer.* Winnebago City." He then said: "You want to get off, and get off quick." "He said that two or three times." The plaintiff also testifies that he conducted him to the platform, "urged" him, and "seemed to be in a hurry;" that the night was very dark; that he knew the train was moving, but, he thought, very slow; and that he had not been notified that it had passed Winnebago City. The witness says, also, he cannot remember whether the conductor helped him down the steps, but says he had hold of his arm; but "the train gave a lurch, and he sort of pushed me, and I went off." On his cross examination he says that after they started for the rear end of the car the conductor said to him: "You had

Facts.

better hurry up, and get off as soon as you can;" that witness supposed that the train was coming up to the platform at the station; that he got onto the rear step, and was going to get off there; and, he says, "the train gave a lurch, and I fell off, and he pushed me at the same time." This is the substance of plaintiff's version of the matter. He is contradicted upon the material points by the conductor, who apparently gives a very reasonable and consistent account of the transaction, and one which is essentially different from that given by the plaintiff. But it was for the jury to determine these matters of difference upon the whole case as submitted, and the trial court is so far satisfied with the verdict that it did not deem a new trial proper, either on the ground that the verdict was not justified by the evidence or on the ground of newly discovered evidence. The charge of the court is not returned, and must be presumed to have fairly presented the case to the jury. The defendant insists (1) that there is no proof of actionable negligence on its part; (2) that the evidence clearly establishes contributory negligence; and (3) that a new trial should have been granted on the ground of newly discovered evidence.

1. Whether, upon all the evidence, it was considered by the trial court that the plaintiff was thrust off, or required to leave the train by the conductor, or whether he was simply notified by the conductor to get off, while the train was in motion, without being warned of the risk in doing so, we think there is sufficient evidence of negligence to support the verdict. The conductor admits that the train had left the station, and was going 8 to 10 miles an hour at the time. It might be assumed that he knew the circumstances, and that he would not imprudently advise or direct a passenger to jump off a train, unless it was safe to obey his orders; and the passenger would naturally rely upon his judgment to a greater or less degree, according to the nature of the case. The evidence certainly tended to show that the language and conduct of the conductor in this instance were such as to authorize the plaintiff to conclude that he had a right to get off the train, and that he could safely do as he was directed. *Bucher v. New York C. & H. R. R. Co.*, 98 N. Y. 131, 21 Am. & Eng. R. Cas. 361. The notification to leave the train under the circumstances, if acted on, was likely to expose plaintiff to danger and injury; and, if the evidence of the latter was true, it was reckless and unwarranted conduct.

2. Ordinarily a passenger would be held not to be justified in getting off a train while in motion, except at his own risk. Unless the train is moving very slowly, and the circum-

Leaving moving train—
Conductor's orders.

stances are especially favorable, it would be deemed *prima facie* negligence. It is not necessarily so, however; **and the circumstances presented by the record** Assumption of risk. **were such, in this case, as to make the question one for the jury.** He claims to have been mistaken as to the speed of the train. He was directed to make haste to get off. He might assume that the conductor knew all about the place and the movements of the train, and that it would be necessary to obey orders to avoid being carried beyond his destination. He was suddenly waked out of sleep, he says, and did not understand that the train was moving rapidly. These and perhaps other circumstances were proper to be considered, and were sufficient, we think, to justify the trial court in submitting the case to the jury. *Filer v. New York Cent. R. Co.*, 49 N. Y. 51; *Shannon v. Boston & A. R. Co.*, 78 Me. 60, 23 Am. & Eng. R. Cas. 511; *Pool v. Chicago, M. & St. P. R. Co.*, 56 Wis. 236, 8 Am. & Eng. R. Cas. 360.

3. The affidavits of several persons, whose evidence, it is claimed, can be procured at another trial, show that the account of the occurrence given to them by the plaintiff was different from that testified to by him New trial. upon the stand. This was, however, cumulative evidence of the same kind with that introduced on the trial. It was also in part contradicted, and in part attempted to be explained, in the opposing affidavits. The decision of the trial court, upon the record as presented, ought not to be disturbed by this court. *Lampsen v. Brander*, 28 Minn. 528; *Peterson v. Faust*, 30 Minn. 22. Judgment affirmed.

Passenger—Leaving Moving Train by Conductor's Orders—Sufficiency of Evidence.—Plaintiff, who was a passenger on a freight train, received injuries by jumping from it whilst it was in motion. He testified that he travelled upon the rear platform; that the conductor took up his ticket and that as he was approaching his destination, some person informed him that the train would not stop at the station, but that it would slow up and that he must jump. His testimony did not show that these directions were given by the conductor. The conductor and brakeman both testified that no such directions were given by them; that as the train approached the station the usual signal to stop was given, but that when the conductor went upon the platform of the car to look for plaintiff, he found that he had left the train before it stopped, and he thereupon signalled the train to go on. *Held*, that the evidence was not sufficient to show that the plaintiff jumped from the train whilst it was in motion by the conductor's direction, and that he could not recover. *Herman v. Chicago, M. & St. P. R. Co.*, Iowa Sup. Ct., Jan. 29, 1890.

Same—Exemplary Damages—Absence of Injury.—If, by inadvertence, the conductor fails to stop a train at a flag station, which is the destination of a passenger, and the passenger jumps from the train whilst it is in motion but sustains no injury therefrom, only nominal damages can be recovered; a verdict for exemplary damages cannot be sustained. *Kansas City, M. & B. R. Co. v. Fite*, Miss. Sup. Ct., Jan. 27, 1890.

WALKER

v.

VICKSBURG, SHREVEPORT & PACIFIC R. CO.

(Louisiana Supreme Court, October, 1889.)

Passengers—Jumping from Moving Train—Failure to Stop at Station.—While it is the duty of a railroad company to stop its train at the station to which it has contracted to carry a passenger, and to land him safely and conveniently, yet the fact that the company neglects this duty, and its train passes the station without stopping, does not justify a passenger in jumping from the moving train, unless expressly or impliedly invited to do so by the employees of the company.

Same—Contributory Negligence.—The plaintiff's act in jumping from the moving train was purely voluntary, uninfluenced by any invitation expressed or intended by the company's employees, and excused by no impending danger or necessity of any kind, except his simple unwillingness to be carried beyond his destination; it was imprudent and dangerous, and his action for resulting injury is barred by his own contributory fault.

WATKINS, J., dissenting.

APPEAL from District Court, Parish of Webster.

Watkins & Watkins for plaintiff.

Wise & Herndon and *F. P. Stubbs* for defendant.

FENNER, J.—On the 16th of October, 1886, plaintiff was a passenger on defendant's train, having purchased a ticket from Bodeau station to Doyline station. The latter **Facts.** is a flag station, at which trains do not stop unless they have passengers to put off or take on. If a signal is given from the station that there are passengers to get on, the engineer blows two whistles to signify intention to stop. If there are passengers to put off, the conductor notifies the engineer by pulling the bell rope, and the engineer, on receiving such signal, blows two whistles to signify the same intention. If there are no passengers to take on or put off, only one whistle is blown, and the train does not stop, but simply slackens speed to a rate of eight or ten miles an hour in passing the station, to enable the mails to be thrown on and off. On this occasion the train had been compelled to come almost to a stop about 200 yards from Doyline, on account of some oxen which were on the track. It then moved forward again, and the conductor, knowing he had this passenger to put off, attempted to signal the engineer with the bell rope, but, owing to some tangle or disarrangement, could not do so, consequently the two whistles were not blown. The conductor, the engineer, and the porter all agree on this point, and there is no contradictory statement. The porter only calls out flag sta-

tions when there are passengers to put off and the signal to stop is blown. The plaintiff testifies that the porter did pass through the car, and call out Doyline station, but this the porter positively denies, and considering the uncontradicted testimony that no signal to stop was given, the fact is of little importance. The consequence was that the train passed by the station, only slackening its speed, as customary, but not stopping.

The plaintiff having several times made this same trip, and knowing his station, went out on the platform of the car for the purpose of getting off. He went down on the steps of the car, and, after passing a little beyond the station platform, seeing that the car did not stop, and, as he says, supposing that it was intended that he should get off, and that he could do so with safety, he stepped off while the train was moving; and he says that, as he was in the act of doing so, the train accelerated its motion, giving a sudden jerk, which threw him, and broke his ankle, occasioning the injuries for which his present action in damages is brought. He says that, just before he stepped off, some one called to him, "Is not this your station?" which acted in determining him to step off; but the evidence leaves no doubt that the person who asked the question was not any employe of the company. The conductor says that, having failed to give the signal, he went through the train, after passing the station, to find plaintiff, intending to back the train up to the station, and put him off, but failed to find him, and supposed he had gotten off when the train had stopped on account of the oxen on the track.

Under these facts, the fault of the company, in not stopping its train, cannot be disputed. It was bound, under its contract, to stop, and safely discharge its passenger.

But did its negligent failure to discharge this duty justify the plaintiff in jumping off the moving train, or absolve him from the charge of contributory negligence, which under the settled jurisprudence of the court, is a bar to his recovery? We consider the law to be settled by the overwhelming weight of authority that while a railroad company is bound to stop its train at the station to which it has contracted to carry a passenger, and to land him safely and conveniently, the fact that the train is about to pass such a station without stopping does not justify the passenger in jumping off the moving train, unless expressly or impliedly invited to do so by the company.

A leading case on the subject, which we select from a multitude of authorities, not only on account of the great lawyer who delivered it, (Judge BLACK,) but also because it has been expressly quoted and affirmed by this court, lays down the principle, in a state of facts

*Jumping from
moving train
—Failure to
stop.*

*Authorities
examined.*

strikingly similar to those before us, as follows: "The plaintiff below was a passenger in defendant's cars from Philadelphia to Morgan's Corner. The train should have stopped at the latter place, but some defect in the bell rope prevented the conductor from making the proper signal to the engineer, who therefore went past, though at a speed somewhat slackened on account of the switches which were there to be crossed. The plaintiff, seeing himself about to be carried on, jumped from the platform of the car, and was seriously hurt in the foot. * * * Persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance. They must carry the passengers to their respective places of destination, and set them down safely, if human care and foresight can do it. * * * But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness and folly. * * * From these principles it follows very clearly that if a passenger is negligently carried beyond his station, where he * * * had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back, because these are the direct consequences of the wrong done to him. But, if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself." *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147.

This court long ago laid down the like doctrine in the following language: "If the daughter of plaintiff voluntarily jumped from the cars when in motion, even though it was the constant habit of the company to stop at that place, the leap not being made to avoid an imminent impending peril, produced by the misconduct of defendants, but to avoid being carried beyond her destination, she was herself guilty of such imprudence as relieves the company from the consequences of the want of caution on the part of their servants; for in such a case the accident may be attributed to the fault of both parties, which would destroy plaintiff's right to recover." And then the court quotes, with approval, the above decision of the Pennsylvania court. *Damont v. New Orleans & C. R. Co.*, 9 La. An. 441.

In a very recent case we referred to this principle as an evident one, saying: "Now, supposing that any passenger on a regular train should labor under a similar mistake in believing, for instance, that the train was passing by the station to which he was destined, and, fearing that he might be carried beyond the same, should jump out as the train was pulling out of the

station, and be injured by falling, could the company be held liable for injuries thus received? Evidently not." *Reary v. Louisville, N. O. & T. R. Co.*, 40 La. An. 32; 34 Am. & Eng. R. Cas. 277.

In the multitude of adjudications and judicial expressions on this subject, by numerous courts, there have naturally arisen varieties and conflicts of opinions, and decisions, hostile, or apparently hostile, to each other, are quoted on either side; but the weight of authority undoubtedly sustains the views above expressed, and, at all events--what more nearly concerns us--they have been adopted in the jurisprudence of Louisiana.

The question is, then, whether the plaintiff, in jumping off the moving train, acted upon the express or implied invitation of the company. The evidence conclusively negatives any express invitation on the part of any employe of the company. It is equally clear that the officers in charge of the train never intended or expected that plaintiff should get off, and certainly did not slack up for the purpose of letting him get off. They acted precisely as they would have done had there been no passengers to take on or put off; for the engineer had no signal to that effect, therefore did not know that there was a passenger to put off, and only slackened the speed, as was his duty on all occasions, simply to allow the exchange of mails. Is it possible to construe this as implying an invitation? If so, such an invitation is given to every one who wants to get off the train whenever it passes such a station.

Invitation to
leave train.

The testimony is conflicting as to the rate of speed at which the train passed the station. Nothing can be more uncertain than such estimates, especially when made by unskilled observers. The natural and probable conclusion from the circumstances is that the train only made the usual slacking of speed for exchanging the mails. There was no reason why the engineer should have acted otherwise. Plaintiff thinks he would have landed safely but for the acceleration of speed which took place as he was in the act of jumping. But this acceleration only took place after the train had passed the platform, and after the mails had been exchanged which was the usual and natural course. If plaintiff chose to infer an invitation to jump off from these customary acts of the company, it was a rash conclusion. One of his own witnesses testifies that he never, at any other time, saw a person jump from a train moving as fast as that one was, although he says it was moving slowly. That plaintiff's action was imprudent is shown by the result, and, as we think, by all the circumstances. His own evidence shows that he hesitated about at-

tempting the jump, and was only determined by the question of a third person, and the thought that otherwise he would be carried beyond his station. His act was purely voluntary, uninfluenced by any invitation expressed or intended by the employes of the company, and excused by no impending danger or necessity of any kind, except his mere unwillingness to be carried beyond his station. It was imprudent and dangerous, and his action for the resulting injury is clearly barred by his own contributory fault. It is therefore ordered and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be judgment in favor of defendant rejecting the demand, at plaintiff's cost, in both courts.

WATKINS, J., dissents, and files separate opinions.

WATKINS, J., (*dissenting*).—Plaintiff sued the railroad company for \$10,000 damages for injuries he received in alighting from one of its trains while in motion, on which he was a passenger; it having passed the station to which he was ticketed without making a full stop, only slowing up to permit an exchange of mails. There was a verdict of a jury in his favor, which this court has set aside, and the substance of the majority opinion is that the act of the plaintiff was voluntary, and without invitation, on the part of the officers and agents of the railroad company; and while the company was, primarily, guilty of negligence in failing to carry out its contract of safe carriage, the plaintiff was guilty of contributive negligence.

The opinion puts the proposition thus: "The question is, then, whether the plaintiff, in jumping off the moving train, acted upon the express or implied invitation of the company;" and, answering that question, the opinion says: "The evidence conclusively negatives any express invitation on the part of any employe of the company. It is equally clear that the officers in charge of the train never intended or expected that he should get off." These *dicta* are the sole foundation of the opinion, and the legal proposition announced rests exclusively upon *Damont v. New Orleans & C. R. Co.*, 9 La. An. 441; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; and *Reary v. Louisville, N. O. & T. R. Co.*, 40 La. An. 32, 34 Am. & Eng. R. Cas. 277.

Let us see what is their purport, and what are the principles they announce, and whether they are a proper foundation for the opinion. In the *Damont* case none of the facts are stated. The only question discussed was the correctness of the charge of the judge *a quo* to the jury, and the case was remanded for a new trial. The only cases

cited therein as authority were *Lesseps v. Pontchartrain R. Co.*, 17 La. 362, and *Fleytas v. Pontchartrain R. Co.*, 18 La. 339. Those two cases involved claims for damages sustained by the owners of slaves who had been killed, one in attempting to cross a railroad track, and the other while lying on the track, either drunk or asleep. The mere citation of those cases as authority for the decision of that case shows how imperfectly understood were the questions involved, in 1854, when that opinion was rendered; for, of course, there being between the owners of the slaves and the railroad companies no contractual relations whatever, the former were primarily guilty of gross negligence, and the latter were without fault. But the opinion quotes with approval the paragraph from *Pennsylvania R. Co. v. Aspell*, which was quoted in the *Damont Case*, but in that extract no part of the facts of that case is recited. They are brought forward in *Wood's Railway Law*, at pages 1130 and 1132, and we quote them to show how very inapplicable to this case they are. They are as follows, viz.: "Whilst the train was in motion, the plaintiff leaped from the car, though warned by the conductor and brakeman not to do so, and informed him that the train would be stopped and backed to the station. * * * If he had heeded them he would have been safely let down, at the place he desired to stop at, in less than a minute and a half. Instead of this, he took a leap which promised him nothing but death; for it was made in the darkness of midnight, against a wood pile close to the track, and from a car going probably at the full rate of ten miles an hour."

On this state of facts both the *Aspell* and *Damont Cases* depend. On such a state of facts, of course, the plaintiffs were held to have been guilty of gross negligence, and the railroad companies without fault. But why should those decisions be cited in this case as sustaining the doctrine of contributory negligence? I confess I cannot understand, for I respectfully submit that this record presents no such case.

Nor is the case of *Reary v. Louisville, N. O. & T. R. Co.* at all applicable, because it was one of a little girl who received injuries in jumping from a train of cars while in motion. But she was not a passenger. The train was in the depot-yard being uncoupled at the time, and the conductor had gone home. The paragraph quoted from that case in the opinion was hypothetically stated, merely for the purpose of an illustration and has no weight, as a part of that decision. Without antagonizing the opinion on its statement of facts, I propose to make an independent one.

As a witness, the plaintiff says that, when within 200 yards of the station of his departure, there was a yoke of oxen on

the track, and the speed of the train was slackened until they were frightened off. Afterwards the speed was increased a little, the whistle blown, and it was again reduced, and slowly moved by the depot-platform, while the mail was being exchanged. When the train passed the depot he thought it was running slowly enough for a man to get off without danger. The only thing that prevented him getting off safely was that the train gave a jerk forward as he got off. The train was moving all the time, but very slowly. The place where he attempted to alight was a better place to get off than that where persons usually get off. The ground was smoother. The train was running at less than one-half its usual speed. When he was passing the place where the ties, etc., were lying, he thought it was not a safe place to get off. As he hurriedly made up his mind, the train passed an open place, and he got off there, because he thought it was better ground, and he could get off there without getting hurt. Using his own language, he says: "Just at the moment that I got off, the train made a jerk. I was in the act of leaving the steps, when the jerk came. I had let go the railing, and had started to step in the direction of the way the train was going, and one foot had left the steps, and the other [was] still on the steps, and [in the act of] leaving, when the jerk came." This occurrence happened at 10 o'clock A. M.

Another witness for plaintiff states that he was present, and saw the train approach the station, Using his own words, he says: "I think the train checked up a little, west of the platform, but near it. I do not think the train stopped entirely at the station this trip. * * * I think the train came nearer stopping that day than it usually does to put off the mail * * * About the time the locomotive got opposite the platform the train was moving very slow.

Another of plaintiff's witnesses states, using his own language: "I was at Doyline station the day that Mr. Walker got his leg broke. I was in about fifteen steps of him when it happened. I saw him when he went to step off the train, and it appeared to me that, as he did so, the train got faster, and jerked his feet, from under him. Just before and at the time he attempted to get off, the train was going slow, and just as he went to step it appeared to me that it jerked his feet from under him. I do not know that it was going any slower than when they checked up for the mail. I have never seen anyone get off there when the train was running as fast as it was then, except Mr. Walker. I have frequently got on the train * * * when it was going as fast as that."

On the part of the defendant there is not a syllable of pos-

itive testimony in opposition to these emphatic statements. The conductor was sworn, and simply stated "that the average rate of running is about 24½ miles an hour on the road from Monroe to Shreveport. This was true in October, 1886. * * * The average rate of speed, when passing flag stations, when the train does not stop, is between eight and twelve miles an hour, for the exchange of mails, as above stated." This witness does not profess to have any knowledge of the occurrence, because he says: "I learned the day afterwards that Mr. Walker jumped off the train, and had broken his leg." He subsequently volunteered the statement that "I judge that the train was running at about ten miles an hour on that day, when it passed Doyline, because it usually passes at that speed when only delivering the mail."

The engineer testified that he was on this road, running a passenger engine and train, in October, 1886, but that he had "no recollection of the accident that resulted in the injury of Mr. Walker." Said he did not "recollect who was engineer on the passenger train going east, on the 16th of October, 1886."

The defendant's third witness was the porter, who states, using his own words: "I recollect the time that Mr. Walker was said to have been hurt, at or near Doyline station." He says further: "I remember that on that day no signal was given to stop at Doyline, and I did not leave my seat."

Consequently it is established by the concurring statements of defendant's three witnesses, all of them trainmen, that they knew nothing of the occurrence, and could testify to nothing adverse to the testimony of plaintiff's witnesses. Of course the mere theoretical conjecture of the engineer, as to the speed of the train, amounts to nothing at all.

The recital of the foregoing facts is sufficient to take this case out of the principle announced in *Pennsylvania R. Co. v. Aspell*. They plainly show the defendant in fault, and without excuse. Now, I will consider whether they show the plaintiff guilty of contributory negligence to such a degree as to preclude his right to recover. A review of authorities will first be necessary.

It was decided by the supreme court of Tennessee, in 1887, that the act of a passenger in alighting from a train while in slow motion, who sustained injuries in consequence, has been, in the courts of several of the states, treated as negligence *per se*, and no damages can be recovered; but, say the court, "this is contrary to the current of judicial opinion, in this country at least. The true rule deducible therefrom is stated in 2 Wood, Ry. Law, 1130, to be that in all cases the question is one of fact, whether

Review of
authorities.

'in view of the particular circumstances, the passenger was guilty of negligence in attempting to leave the train while it was in motion. In this, as in all other matters where the safety of passengers is concerned, the company owes a duty to the passenger to act with proper care and caution; and *if the motion of the train is not entirely stopped, and the passenger is expressly or impliedly invited to leave the train while moving at a slow rate of speed, he has a right to presume that it is safe for him to do so.* * * * If the train is moving slowly, and there is no obvious danger in getting off, it cannot be said to be negligence *per se* to make the attempt; especially if the passenger is directed to do so; * * * and it would be wrong to instruct the jury that such an attempt *per se* constituted contributory negligence.' *Id.* 1129. '*As a rule, it may be said that where a passenger, by the wrongful act of the company, is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably.*' *Id.* 1131, 1132" citing *Thomp. Carr.* 227-267. See, also, *Plopper v. New York C. & H. R. R. Co.*, 13 Hun (N. Y.), 625; *Keating v. New York C. & H. R. R. Co.*, 49 N. Y. 673; and *Taber v. Delaware, L. & W. R. Co.*, 71 N. Y. 489.

"The earlier cases," says the Tennessee court, "establishes a rule that leaving a train [while] in motion was such negligence as defeated the right of recovery, unless done *to avoid danger of remaining on board*, and this is still stated as the 'general rule' in many authorities. 2 Wood, Ry. Law 1126; *Thomp. Carr.* 267. But the rule we have laid down is the modern one, and formulated from the many exceptions, and this modification has been before recognized by this court. *East Tennessee, V. & G. R. Co. v. Conner*, 15 Lea (Tenn.), 258." *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 345.

It was decided by the supreme court of Georgia, in a recent case, that, "the railroad was bound to put him [a passenger] off; to stop its train for this purpose. This it failed to do, and it was not want of ordinary care in the passenger to use the only means to get off the course of the defendant permitted." *Georgia R. & B. R. Co. v. McCurdy*, 45 Ga. 289. See, also, *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; *Loyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131.

The proper limitation of that rule is stated in Wood's *Railway Law* thus: "But, generally, no recovery can be had if the cars are under such motion as to render it obviously dangerous for a person to attempt to leave them," p. 1136;

citing *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Damont v. New Orleans & C. R. Co.*, 9 La. An. 441; *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.), 501. The author then proceeds: "And, under such circumstances, it is not sufficient to charge the company that the conductor advised the passengers to make the attempt. It is the duty of the passenger to exercise his own judgment, and, if the danger was so great that a man of ordinary prudence would not have attempted it, he is guilty of such contributory negligence as bars a recovery;" citing *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510; *Chicago B. & O. R. Co. v. Hazzard*, 26 Ill. 373. "When the *danger is apparent*, it must not be braved simply because the company is bound to stop the train, or because it is very important that the passenger should stop at that particular time." *Wood, Ry. Law*, 1136. But the rule is stated concisely to be: "But, in all cases, the question of liability must necessarily be determined by the facts and circumstances of each case,—whether the train was in rapid motion, * * * and whether the real danger was obvious." 2 *Wood, Ry. Law*, 1137. "But where a railway company fails to bring its train to a full stop at a station, it will be liable in damages for injuries sustained by a passenger in attempting to get off, if, under all the circumstances, it was prudent for him to make the attempt." *Id.* 1148, 1149; *Price v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 414, 3 *Am. & Eng. R. Cas.* 365; *Central R. & B. R. Co. v. Letcher*, 69 Ala. 106, 12 *Am. & Eng. R. Cas.* 115; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376.

The italics in preceding quotations are those of the writer.

Abbotts states the rule thus: "Alighting from the car at an unsuitable place is not contributive negligence, if the train is not stopped at a suitable one, and if there is not such apparent danger as would deter a person of ordinary prudence." 2 *Abbotts', Dig. Corp.* 598.

Beach announces the rule thus: "As in the case of boarding a railway train in motion, so it is held not contributory negligence *per se* for a passenger to jump off a train which is moving. *Galveston, H. & S. A. R. Co. v. Smith*, 59 Tex. 406; *Loyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *Brooks v. Boston & M. R. Co.*, 135 Mass. 21, 16 *Am. & Eng. R. Cas.* 345. Whether or not a railway company shall be held liable in damages for injuries sustained by a passenger in attempting to leave one of its trains while in motion will depend upon whether, under all the circumstances, it was prudent for him to make the attempt." *Beach, Contrib. Neg.* p. 157, § 53; citing the following authorities, viz: *Price v. St. Louis, K. C.*

& N. R. Co., 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; Doss v. Missouri, K. & T. R. Co., 59 Mo. 27; Parish v. Eden, 62 Wis. 272; Langhoff v. Milwaukee & P. C. R. Co., 19 Wis. 515; Curry v. Chicago & N. W. R. Co., 43 Wis. 686; Leavitt v. Chicago & N. W. R. Co., 64 Wis. 228; St. Louis, I. M. & S. R. Co. v. Person, 49 Ark. 182, 30 Am. & Eng. R. Cas. 567; St. Louis, I. M. & S. R. Co. v. White, 48 Ark. 495, 30 Am. & Eng. R. Cas. 545; Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 30 Am. & Eng. R. Cas. 564; Hunter v. Coopers-town & S. V. R. Co., 112 N. Y. 371, 37 Am. & Eng. R. Cas. 74, and many other cases.

In *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 27 Am. & Eng. R. Cas. 155, it was held that, to justify a recovery, the act of the defendant must put the passenger to a sudden election between alternative danger or inconvenience, or create some situation "which interfered, to some extent, with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety."

This principle has been frequently maintained and upheld by different courts, and notably in the following, viz: *South Covington & C. St. R. Co. v. Ware*, 84 Ky. 267, 27 Am. & Eng. R. Cas. 206; *Collins v. Davidson*, 19 Fed. Rep. 83; *Haff v. Minneapolis & St. L. R. Co.*, 14 Fed. Rep. 558; *Lawrence v. Green*, 70 Cal. 417; *Chicago & N. E. R. Co. v. Miller*, 46 Mich. 532, 6 Am. & Eng. R. Cas. 89; *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind. 26, 31 Am. & Eng. R. Cas. 36; *Stewart v. Boston & P. R. Co.*, 146 Mass. 605, 34 Am. & Eng. R. Cas. 499; *Delaware & H. Can. Co. v. Webster (Pa.)*, 6 Atl. Rep. 841; *St. Louis, I. M. & S. R. Co. v. Person*, 49 Ark. 182, 30 Am. & Eng. R. Cas. 567.

The rule was again formulated thus, in *Strand v. Chicago & W. M. R. Co.*, 64 Mich. 216, 28 Am. & Eng. R. Cas. 213: "In order to make him so, (negligent) he must as in all other cases, decide upon facts as they appear, as a man of ordinary care would do under the same circumstances. It is not right of any passenger to run evident risks to his safety, but the rule of prudence binding on him must be that which, under just such circumstances, would restrain all men of ordinary prudence. If the mind of an ordinarily prudent man would be impressed with the belief of danger, he has no right to incur the danger. If the danger would not be apparent, he is not negligent in acting on that assumption."

To this list might be added an almost indefinite number and variety of cases to the same effect. But it is quite sufficient to say that on the faith of those quoted and cited, the following principles are firmly established on American jurisprudence, viz:

Alighting
from moving
train—Rules
of law.

(1) That it is not *per se* negligence on the part of a passenger to alight from a moving train.

(2) The question is one of fact whether, under the particular circumstances, the passenger was guilty of negligence in attempting to thus alight; and, if it appear that he was not expressly or impliedly invited to leave the train while moving at a slow rate of speed, he has the right to presume that it is safe for him to do so.

(3) When a passenger, by the wrongful act of a railroad company, is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, it is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably, and it is not want of ordinary care in the passenger to use the only means to get off the course of the defendant permitted.

(4) To justify a recovery, the act of the company must put the passenger to a sudden election between alternate danger or inconvenience, or create some situation which interfered, to some extent, with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.

(5) It is the duty of the passenger to exercise his own judgment, and, if the danger was so great that a man of ordinary prudence would not have attempted it, he is guilty of such contributory negligence as bars a recovery; for, when the danger is apparent, it must not be braved, simply because the company is bound to stop the train, or because it is very important that the passenger should stop at a particular place, but, in all cases, the question of liability must depend upon whether the train was in rapid motion and the danger obvious,—the question being whether, under the circumstances, it was prudent in the passenger to make the attempt to alight and that depends upon whether the danger was imminent and obvious.

I therefore respectfully submit that the mere fact of the plaintiff having attempted to alight from defendant's train while in motion did not constitute his act contributory negligence, because it was voluntary and without an invitation, express or implied.

The act of the company put the plaintiff to a sudden election between alternative danger or inconvenience, and thus created a situation well calculated to divert his attention from that danger, and inspired a confidence in the safety of his attempt to alight therefrom. The danger does not appear to have been either apparent or imminent. I think the verdict of the jury and the judgment of the court should have been affirmed.

As was appropriately said in *Williams v. Pullman Palace Car Co.*, 40 La. An. 420, 33 Am. & Eng. R. Cas. 414, in deciding a kindred question, "this court should seek to place its rulings and jurisprudence in line and in harmony with those of the supreme court of the United States, and of the courts of last resort of our sister states, whenever those decisions do not militate against the principles of our special and exceptional system of laws;" and it is in this spirit I have prepared this elaborate dissent, and in the hope of attaining this end that I place my views on record.

Jumping from Moving Train—Failure to Stop at Station.—See *Hemmingway v. Chicago, M. & St. P. R. Co.* (Wis.), 28 Am. & Eng. R. Cas. 216; 33 *Id.* 511, note 518; *Nance v. Carolina Central R. Co.* (N. Car.), 26 *Id.* 223; *Memphis & L. R. R. Co. v. Stringfellow* (Ark.), 21 *Id.* 374; *Edgar v. Northern R. Co.* (Ont.), 16 *Id.* 347, 22 *Id.* 433.

BENNETT

v.

NEW YORK, NEW HAVEN & HARTFORD R. CO.

(*Connecticut Supreme Court of Errors, September 9, 1889.*)

Passenger—Exit from Station—Unlighted Stair—Assumption of Risk.—Plaintiff who resided near defendant's station, reached it after dark. There were four stairways, by any one of which he could reach the street, and passengers were accustomed to take any one of them indiscriminately. Three of them which were convenient for plaintiff to use, were well lighted; the fourth was not lighted. He passed the three lighted stairways and attempted to find the fourth, but missed it in the dark and walked over the edge of the platform. *Held*, that by failing to avail himself of the opportunity to use the lighted stairway and by attempting to find the unlighted stairway which was indistinguishable, he assumed the risk of accident therefrom, and that he was not entitled to recover.

APPEAL from Superior Court, New Haven County.

W. C. Case and *W. H. Ely* for appellant.

W. K. Townsend and *G. D. Watrous* for appellee.

CARPENTER, J.—This is an action for damages sustained by falling from the platform of the depot at the defendant's station at Yatesville. The defendant suffered a default, and was heard on the question of damages. The superior court found that the plaintiff was guilty of contributory negligence, and assessed nominal damages only. The plaintiff appealed.

The facts, briefly stated, are these: The plaintiff lived near

the station, which was at a small village, and arrived there in the evening on one of the defendant's trains. The station agent had left, and there was no light in the depot, except one lantern. One outside lamp was burning, which lighted the platform on the east side of the depot. The plaintiff went to the waiting-room to speak to an employe of the defendant. He then, in company with another man, started to go home. From the easterly platform two stairways led to the ground below. Near the easterly end of the north platform is another stairway. All these stairways were sufficiently lighted by the burning lamp. They passed by all these stairways on to the north platform, "passing into utter darkness," intending to go down some stairs near the westerly end of the north platform. That part of the platform "was entirely dark, and the steps indistinguishable." The plaintiff missed his calculation, went some eight inches beyond the stairs, and walked off the westerly end of the platform, falling some four feet, to the ground, and was seriously injured. We are not called upon to consider any question relating to the negligence of the defendant. The court below made no finding on that point, but disposed of the case entirely on the question of contributory negligence. Citing *Dyson v. New York & N. E. R. Co.*, 57 Conn. 9, and *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn. 461, 25 Am. & Eng. R. Cas. 342, the plaintiff's counsel insist that, the facts being found, the question is one of law which this court can review. Conceding this, still, before we can disturb the judgment, it must appear that the court below arrived at its conclusion by reason of some error in law. Unlike the cases cited, it does not appear in this case that the court below found the plaintiff guilty of negligence by requiring of him some act which the law did not require, or inferred it from the omission of some act which was properly omitted. The court simply required of him ordinary care under the circumstances, and found as a fact that he did not exercise such care. We think the evidential facts legally justify the conclusion of fact to which the court came.

Let us start with the plaintiff to go to his home from the east platform. There were four flights of stairs, by any one of which he could reach the ground, and passengers were accustomed to take any one of them indiscriminately. Three of them were well lighted, each one of which was convenient for him to use. Had he taken any one of them he could have passed down in safety. Had he taken it and been injured, and had given no explanation, or an insufficient one, the court would have been justified in attributing to him negligence. In such

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Evidence sufficient to establish contributory negligence.

a case, obviously, only slight care would have been required, and a failure to exercise slight care is generally gross negligence. Unexplained, a failure to use lighted stairs, and passing into utter darkness in search of stairs that are indistinguishable, is *prima facie* evidence of negligence. But it is said that the plaintiff had a right to pass by the lighted stairs, and to use the unlighted ones. That is true, provided he assumes the risk. But had he a right to do so at the risk of the defendant? Having decided to do so, what now does the law require of him? He has now passed from a place of safety into one of great danger. The circumstances have entirely changed. The law, instead of being satisfied with slight care, requires the utmost care. Slight negligence becomes gross negligence, because none will be tolerated. Every precaution must be used to make sure of finding the stairs. His familiarity with the premises is of little service to him, except to apprise him of his danger, and that enhances the care which is expected of him. Every one knows how difficult it is in walking in utter darkness to correctly calculate courses and distances, even in very familiar localities. The record does not disclose that any precautions were taken to know and keep in mind his whereabouts, except perhaps to rely upon his general knowledge of the premises to inform him when he reached the stairs. If that is so, he was inexcusable. He not only disregarded his legal duty to the defendant, but also the instinct of self-preservation. One who will disregard the latter will hardly be expected to be solicitous about the former. We cannot see that the court below committed any error. The other judges concurred.

Duty of Company to Light Station.—Missouri Pac. R. Co. v. Neiswanger (Kan.), 39 Am. & Eng. R. Cas. 471; Alabama G. S. R. Co. v. Arnold (Ala.), 35 *Id.* 466; note 476; Moses v. Louisville, N. O. & T. R. Co. (La.), 30 *Id.* 556; St. Louis, I. M. & S. R. Co. v. White (Ark.), 30 *Id.* 545, note 556; Buenemann v. St. Paul, M. & M. R. Co. (Minn.), 18 *Id.* 153, note 155; Stewart v. International & G. N. R. Co. (Tex.), 2 *Id.* 497.

DELAWARE, LACKAWANNA & WESTERN R. CO.

v.

TRAUTWEIN.

(New Jersey Court of Errors and Appeals, February 20, 1890.)

Common Carriers—Duty—Obligation to Transport Passengers and Freight.—The duty of common carriers, with respect to the transportation of persons or property, is a duty independent of contract, arising by implication of law from the fact that persons or property are received in the course of the business of such employments.

Injuries to Passengers—Travelling on Sunday.—The plaintiff, a passenger on the defendant's railway train, received an injury in leaving the depot grounds at the place of her destination, through the defendant's negligence. In a suit to recover damages for this injury, *held*, that the fact that the plaintiff was travelling on Sunday, in violation of the act concerning vice and immorality, (Revision, 1227), did not preclude her from maintaining the action.

Stations—Safety—Duty to Passengers.—The duty of a railroad company, as a carrier of passengers, does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means of access to and from its stations for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe.

Same—Private Stairway—Implied Invitation—Liability.—At the station at which the plaintiff alighted from the cars the track was upon an embankment above the public road, over which the railroad was carried by a bridge. The company had a depot building for passengers on the north side, on a level with the track, at the end of which there were steps for the accommodation of passengers, leading down to the public road. On the other side of the track there was another stairway resting on the embankment of the railroad, and on the company's grounds, leading also to the street. This stairway was built and kept in repair by private persons residing in the neighborhood, for their own convenience, as a means of access to and from the station. This stairway had been in use by passengers generally. In use as well as appearance, this passage-way appeared to have been provided as a means of access to and from the depot grounds. The train reached the depot at 9:35, on a dark and stormy night. There were no lights in the depot, and no person there to direct passengers the way to leave the depot grounds. The plaintiff, in endeavoring to go to this stairway for the purpose of getting to the public road, fell over some timbers, and was injured. *Held*: (1) That the way of passage taken by the plaintiff being there by the recognition and assent of the company, and held out by it as one of the passage-ways for the entrance and exit of passengers to the public street, the plaintiff was justified in using it. As between a passenger injured in using the passageway, it is immaterial at whose expense the stairway was built and kept in repair. (2) That the company was not absolved from the duty to keep this passage-way reasonably safe by the fact that it had provided another passage-way, which the plaintiff might have taken.

ERROR to Supreme Court.

Beble, Muirheid & Magie for plaintiffs in error.

Leon Abbett and William F. Abbett for defendant in error.

DEPUE, J.—Emma Trautwein, the defendant in error, on Sunday, the 11th of September, 1887, was a passenger on a train of the Delaware, Lackawanna & Western Railroad Company from New York city to Lyndhurst, N. J. She took passage in the company's train, leaving New York at 9 o'clock in the evening, and reached Lyndhurst about 9:35 P. M. She alighted from the train, and in leaving the station to reach the street fell over some railroad ties, and received injuries for which this suit was brought. On a verdict for the plaintiff below, and judgment thereon, this writ of error was brought, and errors assigned upon the rulings of the trial judge.

The act concerning vice and immorality provides that no travelling, worldly employment, or business, ordinary or servile labor, or work either upon land or water, **Travelling on Sunday.** (works of necessity and charity excepted), shall be done, performed, or practiced by any person or persons within this state on Sunday. The penalty prescribed for violating this statute is the forfeiture of one dollar for every such offense, to be recovered upon conviction, and paid for the use of the poor of the township in which the offense was committed. Revision, p. 1227, § 1. The section contains a proviso that it should be lawful for any railroad company in the state to run one passenger train each way over its road on Sunday for the accommodation of the citizens of the state. This proviso has the effect not only to give to the company a right to run the specified trains on Sunday, but also confers the right upon the citizen to use such trains for ordinary travel. *Smith v. New York, S. & W. R. Co.*, 46 N. J. Law, 7, 18 Am. & Eng. R. Cas. 399. As between the company and a passenger on its train, it would seem that the latter would have the right to assume that the train on which he is received as a passenger is the train run under the protection of the proviso, whatever effect the duplication of trains might have in subjecting the company to the penalty. There is also some evidence that the purpose of the plaintiff in going to New York on that day was to obtain from a physician a prescription and get medicine for her mother,—a purpose that would probably exempt the plaintiff from the penalty prescribed by the act. But an instruction to the jury, put on record in the bill of exceptions, put the plaintiff's case on a broader ground. The trial judge assumed that the company was running this train in violation of the statute, and that the plaintiff was also travelling in violation of the statute,

and instructed the jury that these circumstances did not debar the plaintiff of her right to recover. If this proposition be sound, it will not be necessary to consider the rulings of the trial judge in construing the proviso, and with respect to the purpose of the plaintiff's journey on that day on her right to recover. In Massachusetts, Maine, and Vermont it has been held adversely to the legal proposition adopted by the trial judge. In the federal courts, and in the courts of other sister states, the decisions have been in accordance with the ruling of the trial judge.

A contract to carry made on Sunday, or to be performed on Sunday, is by force of the statute illegal and void. No action could be maintained for the breach of such a contract, nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied. *Reeves v. Butcher*, 31 N. J. Law, 224. It is also clear that a plaintiff will fail where, to make a cause of action, he is com-

Duty of common carrier arises independent of contract.

pelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments. *Marshall v. York, N. & B. R. Co.*, 11 C. B. 655; *Martin v. Great Indian Peninsular R. Co.*, L. R. 3 Exch. 9; *Gladwell v. Steggall*, 5 Bing. N. C. 733; *Pippin v. Sheppard*, 11 Price, 400; *Carrol v. Staten Island R. Co.*, 58 N. Y. 126. In *Austin v. Great Western R. Co.*, L. R., 2 Q. B. 442, a suit was brought against a railroad company by a child three years and two months old. The plaintiff's mother, carrying the plaintiff in her arms, took a ticket for herself, but not for the child, for passage on the defendant's railway. In the course of the journey an accident happened, and the plaintiff's leg was broken. In a suit for this injury the defendants contended that they were under no contract with the plaintiff, and that they carried the plaintiff without any hire or fare paid for carrying him. The action was held to be maintainable. BLACKBURN, J., said that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely." The English cases to this effect are cited and commented on in *Foulkes v. Metropolitan District R. Co.*, 5 C. P. Div. 157-169. The rule may be considered as settled that a railroad company, having accepted a passenger, is under an obligation to take due and reasonable care for his safety, and that that obligation arises by implica-

tion of law, independent of contract. To give the plaintiff a standing in court to sue for the injury, she has no need of the aid of a contract which was illegal.

Nor was the plaintiff's violation of the Sunday law, in a legal sense, the cause of her injury. It was only the occasion

for an injury by the defendant's wrongful act, and hence her wrong-doing did not contribute to the injury in such a sense as to deprive her of her right of action. It was merely a condition, and not a contributory cause of the injury. Thus in *White v. Lang*, 128 Mass. 598, it was held that if a person, while unlawfully travelling on Sunday, is injured by the assault of a dog, the act of travelling was not a contributory cause of the injury, and that he could, notwithstanding his own violation of the law, maintain his action against the owner of the dog. In sustaining the suit, the court said: "If a person who is at the time acting in violation of law receives an injury caused by the wrongful or negligent act of another, he may recover therefor if his own illegal act was merely a condition, and not a contributory cause, of the injury. * * *

Recovery may be had when wrong-doing does not contribute to injury.

It is true that, if he were not travelling, he would not have received the injury; but the act of travelling is a condition, and not a contributory cause, of the injury."

The ninety-second section of the road act (Revision, 1012) provides that all wagons and other wheel carriages of every kind or description, travelling or passing on the highways within this state, belonging to residents therein, shall track on the ground not less than four feet and ten inches, under the penalty of five dollars for each offense, to be recovered, one moiety of which is to be paid to the overseer of the highways, and the other to the informer. The penalty in this statute, like that in the Sunday law, is prescribed for the purpose of prohibition, and not revenue, and a citizen travelling a public highway with a wagon of a narrower track than that named in the statute is engaged in violating the law. In some parts of this state the use of pleasure and business wagons of the New York gauge, which is narrower than that of our statute, is quite common. In collision cases on public highways or at railroad crossings, the defense that plaintiff is debarred of his action on the ground of contributory negligence, for the reason that the wagon which he was driving did not conform to the statutory gauge, has never occurred to counsel, who are usually astute in discovering grounds of defense under the doctrine of contributory negligence. In my experience, it has never been thought worth while to inquire in such cases as to the track of the wagon injured or destroyed in such a collision, and a defense on that ground

would obviously receive no consideration. The cases sustaining the ruling of the trial judge on this head are numerous. They are cited and approved by leading text-writers in discussing this subject. Bish. Non-Cont. Law, §§ 63, 64; 2 Wood, Ry. Law, § 318; Beach, Contrib. Neg. § 81; Cooley, Torts, (2d Ed.) 178, *155 *et seq.*, and notes. On principle, as well as by weight of authority, the ruling of the trial judge was correct.

The station at which this accident happened was located upon an embankment elevated above the public road, which crosses the railroad under a bridge carrying the railroad over the public road. The company had a depot building for the reception of passengers on a level with the track on the north side of its track. At the west end of this building there were steps for the accommodation of passengers, leading down to the public road. On the south side of the embankment there was a stairway leading also to the public road, built by private persons residing in that neighborhood for their own convenience, and used by passengers as means of access to and from the station. The company did not construct or keep this stairway in repair. The stairway rested against the embankment of the railroad. It was on the company's grounds and led to the public street. From the depot building to the top of this stairway there was a gravel walk, and the employes of the company testified that the passage was kept free and open and unobstructed. It was apparently a way provided as a means of access to and from the company's depot grounds. On the occasion when the plaintiff received her injury the train reached the station at 9:35 P. M. The night was dark and stormy. There was no light in or about the depot building, and no person there to direct passengers as to the way to leave the depot grounds. The plaintiff, in crossing the tracks on her way to the stairway, fell over some timber, and received the injury for which she sues. The plaintiff testified that the only time she was at that depot before that night, she used this stairway, and that she knew of no other passage to or from the depot.

The judge submitted to the jury the question whether the plaintiff was justified in using this way out from the depot, in this language: "Did the plaintiff do right in taking this way out. That depends upon the question whether this way of passage was there by the recognition, procurement or assent of the company, as a means for the entrance and exit of passengers. Proof of such approval by the company, or of its recognition, need not be made by any resolution or declaration of the company, or of its agents. If to persons of ordinary understanding

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Instructions.

and discernment it appeared to be such a way, and by the company it was allowed to remain and be in use by passengers going to or from trains, any one going to and from a train as a passenger was authorized to make use of it. If the company permitted it to be done openly, so that persons of reasonable judgment and discernment would conclude it to be a means of entrance and exit, then any passenger was authorized to take it and use it. It is submitted to you as a question of fact whether, to an ordinary observer, this was held out as one of the passage-ways from the depot to the public street. If so, any passenger, unwarned, might use it as such. If you should so find, it is entirely immaterial who built the stairway or who kept it in repair."

The duty of a railroad company, as a carrier of passengers, does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe. If there be two ways, one of which is faulty in construction or repair, a passenger using it, and injured by its faulty condition, will not be debarred of his action, although the other, which he might have used, was safer. *Longmore v. Great Western R. Co.*, 19 C. B. (N. S.) 183. A company having provided one safe and convenient way of ingress and egress to and from its station, may, as contended for by the company's counsel, suffer private persons, for their own convenience, to have and use another way of access across its depot grounds, and it may be that those who use such a way will do so at their peril, if they have notice of the private character of the way. But that is not this case. The passage-way taken by the plaintiff led to the public street, and had every indication of having been provided for use by the public, as a way to and from the station. Under the charge of the court and the finding of jury it must be taken to be the fact that this way of passage was there by recognition, procurement or consent of the company, and that by sufferance and use it had obtained such an appearance of a passage-way passengers were invited to use, as that persons of reasonable judgment and discernment would conclude it to be a means of entrance and egress. It was of a passage-way having these characteristics that the judge said that it was immaterial who built the stairway, or who kept it in repair.

In *Beard v. Connecticut & P. Riv. R. Co.*, 48 Vt. 101, there was a stairway for passengers through the company's depot building, and also a stairway at each end of the passenger

Duty of carrier to provide means of access to station.

platform. The stairway at the north end was open at the top, and there was nothing to indicate that it was not for the use of passengers. In fact, that stairway was built by an express company, and was used exclusively by the express company for removing express freight, and opened into the street, over a platform for loading and unloading express wagons. The plaintiff, a passenger, in attempting to pass down the stairway in the dark, fell and was injured. For this injury she sued the railroad company. The defendant's counsel requested the trial judge to charge the jury that the plaintiff could not recover unless she showed that the lower platform, in stepping from which she was injured, was on the defendant's premises. The court declined to so instruct the jury, but told the jury that the plaintiff, to recover, must establish that the company was guilty of negligence in leaving the stairway where it left the upper platform open, and without any guard or notice to warn passengers that the stairway was not to be used as a way of passage to the street below, and that she was injured by such negligence or want of care on the part of the defendant without any neglect or want of care on her part contributing to the injury. This instruction was held to be correct. The court, in sustaining the instructions of the trial judge, speaking of the likelihood of a stranger to regard that stairway as designed to furnish a safe way of getting to the street, said: "If not so designed, and it was unsafe to a stranger for such a purpose in the darkness, it was the duty of the defendant to forefend against injury by closing up the head of the stairs, or by notifying in some effectual way against using those stairs for getting to the street. * * * In view of the unquestionable law, the request to which the exception was taken seems frivolous. The open stairs on the margin of the platform led the plaintiff, without fault on her part, to the point of harm. * * * The fact that the bottom of the pitfall on which the plaintiff landed, and thereby received hurt, was beyond the line of ownership of the defendant, neither relieves the duty, nor mitigates the fault, of the defendant."

In the case in hand, contributory negligence by the plaintiff was negatived by the jury. The case is here solely on the use of the passage-way by the plaintiff, and the duty of the company with regard to its condition and safety. We think the instruction of the trial judge on that subject was correct. A passage-way having the characteristics mentioned by the judge became by the company's act a passageway which passengers were invited to use, with respect to which the company was under a duty

Invitation to
use passage
way.

to have it kept reasonably safe for use. A passenger using the way under such an invitation was not bound to inquire by whose contributions the stairway was erected or maintained. Nor was the company absolved from its duty in the premises by the fact that it erected and maintained at its own expense another way of exit. The other exceptions on the record have been examined. We find no error in the conduct of the trial, and the judgment should be affirmed. Affirmed unanimously.

Approach to Station—Duty of Company to Light—Degree of Care.—Railroad companies are bound to provide safe and convenient means of approach to their stations for all who take their trains as passengers, and of departure for those leaving them; and, as a part of this obligation, the stations must be sufficiently lighted, and kept lighted until all passengers have had a reasonable time afforded them to reach a safe public thoroughfare by the aid of such lighting if needed, or unless a guide be furnished for the purpose by the company. A great many trains passing a particular station every day make the approach to and departure from that station very dangerous, and the diligence and care of the railroad company in protecting its passengers in coming and going must be proportionate to the risk incurred by them, and such danger also requires of the passenger cautious circumspection, proportioned to such risk. *Per COMEGYS, C. J.*, charging the jury, in *Wallace v. Wilmington & N. R. Co.*, Del. Super. Ct., Dec. 13, 1889.

Station—Strangers—Extinguishment of Light—Trespasser.—If a passenger, being a stranger to the station and surroundings, and finding himself, almost immediately after alighting from a train, left in utter darkness by the extinguishment of the station light by the agent of the railroad, the railroad cannot claim that the passenger is a wrong-doer if he, in his effort to get to a place of safety or for information, cross other ground of the defendant than that upon which the station is actually erected. *Per COMEGYS, C. J.*, charging the jury, in *Wallace v. Wilmington & N. R. Co.*, Del. Super. Ct., Dec. 13, 1889.

Same—Submission to Guidance of Third Person.—If the plaintiff committed herself to the guidance of a third person, and trusted to his knowledge and skill, she would be held to have waived the duty of the railroad to furnish her with safe means of departure. But if this third person, being a member of the party, be equally ignorant of the proper way to depart, she could hardly be charged with having put herself under such guidance. *Per COMEGYS, C. J.*, charging the jury, in *Wallace v. Wilmington & N. R. Co.*, Del. Super. Ct., Dec. 13, 1889.

SULLIVAN

v.

MAINE CENTRAL R. CO.

(Maine Supreme Judicial Court, December 28, 1889.)

Injuries to Passengers Travelling on Sunday.—Riding upon Sunday for exercise, and for no other purpose, is not a violation of the statute in relation to the observance of the Lord's day. The statute was not intended as an arbitrary interference with the comfort and conduct of individuals, when necessary to the promotion of health in walking or riding in the open air for exercise.

ON exceptions from Supreme Judicial Court, Kennebec County.

Action for damages. There was a verdict for plaintiff, and defendant excepted.

H. M. Heath and *O. A. Tuell* for plaintiff.

F. A. Wilson and *C. F. Woodard* for defendant.

FOSTER, J.—The defendant's contention in support of the single question raised by the exceptions is founded upon the erroneous assumption that riding upon Sunday for exercise, and for no other purpose, is a violation of the statute in relation to the observance of the Lord's day. The statute is not to be so construed. Such an interpretation would be contrary to the spirit as well as the letter of a statute which expressly excepts from its prohibition works of necessity or charity. Rev. St. chap. 124, § 20.

Riding on
Sunday for
exercise not
illegal.

And this exception may properly be said to cover everything which is morally fit and proper, under the particular circumstances of the case, to be done upon the Sabbath.

Tested by this rule, our own court, in *O'Connell v. Lewiston*, 65 Me. 34, and *Davidson v. Portland*, 69 Me. 116, has held that walking out in the open air upon the Sabbath for exercise is not a violation of the statute.

In other jurisdictions, also, it has been held not to be unlawful to ride to a funeral, (*Horne v. Meakin*, 115 Mass. 326;) walking to prepare medicine for a sick child, (*Gorman v. Lowell*, 117 Mass. 65;) riding to visit a sick sister, (*Cronan v. Boston*, 136 Mass. 384;) travelling to visit a sick friend, (*Doyle v. Railroad Co.*, 118 Mass. 195;) a servant riding to prepare needful food for her employer, (*King v. Savage*, 121 Mass. 303;) a father riding to visit his two boys, (*McClary v. Lowell*,

44 Vt. 116;) walking for exercise, (*Hamilton v. Bosto*, 14 Allen (Mass.), 475;) and walking partly for exercise and partly to make social call, (*Barker v. Worcester*, 139 Mass. 74.)

The statute was never intended as an arbitrary interference with the comfort and conduct of individuals, when necessary to the promotion of health, in walking or riding in the open air for exercise. The prohibition is against unnecessary walking or riding. As a general rule, the jury, under proper instructions from the court, must determine this question from the circumstances presented to them.

In this case we can perceive no error in the instructions, and the exceptions must be overruled.

Nor do we think the verdict should be disturbed under the motion for a new trial. A very careful examination of the evidence satisfies us that upon the questions of fact submitted to the jury no interference by this court is necessary. The plaintiff was clearly entitled to some damages. The amount awarded does not appear to be excessive.

Motions and exceptions overruled.

PETERS, C. J., and WALTON, VIRGIN, EMERY, and HASKELL, JJ., concurred.

Injuries to Passengers while Travelling on Sunday—Right to Recover.—See *Delaware L. & W. R. Co. v. Trautwein* (N. J.), *ante*, p. —; *Bucher v. Cheshire R. Co.* (U. S.), 34 Am. & Eng. R. Cas. 389; *McDonough v. Metropolitan R. Co.* (Mass.), 21 *Id.* 354; *Smith v. New York, S. & W. R. Co.* (N. J.), 18 *Id.* 399, note 403, 481; *Knowlton v. Milwaukee City R. Co.* (Wis.), 16 *Id.* 330; *Bucher v. Fitchburg R. Co.* (Mass.), 6 *Id.* 212, note 220; note 23 *Id.* 434.

SAVANNAH, FLORIDA & WESTERN R. CO.

v.

HOLLAND.

(*Georgia Supreme Court, March 1, 1889.*)

Passenger—Personal Injuries—Evidence—Res Ques.—The plaintiff, a passenger upon a railway, who left the train late at night, and in so doing (as he alleges) was injured by a fall which broke his leg, having pulled off his coat, detached his suspenders, bound up his broken limb, crawled through a culvert from one side of the railway to the other, seated himself on the cross-ties, and cried for help, his account of the manner of his leaving the train and receiving the injury, given to a person who reached him about half an hour after first hearing his cries, was no part of the *res gesta*, and, being a mere narrative of a past event, was not admissible evidence in his own behalf.

Evidence—Impeaching Credibility of Witness.—When, on cross-examination, a witness is interrogated as to a conversation with a view to laying the foundation for impeaching him, he has a right to give the whole conversation so far as it is pertinent; and this, without reference to whether the other interlocutor was an agent of the cross-examining party or not.

Same—Attempt to Entrap or Corrupt Witness.—When one, in the interest of a party to the cause, has maneuvered to entrap or corrupt an adverse witness, and the evidence suggests that he was sent on some mission to the witness by an attorney of the party whose interest he sought to promote, the court may charge the jury on the question whether his authority, if any he had, was pure or impure; whether it was limited to the use of proper means for the attainment of right ends, or extended to such means as were actually used, and to ends apparently improper and illegal. Both the fact and the nature of the agency are open to the jury, and the evidence warranted the consideration of both.

Punitive Damages—Pleading.—In order for the jury to assess punitive damages in an action for a tort, it is not necessary that they shall be claimed *eo nomine* in the declaration. It is enough that the facts alleged and proved be such as to warrant the assessment.

ERROR from Superior Court, Mitchell County.

Chisholm & Erwin for plaintiff in error.

W. M. Hammond and *Spence & Twitty* for defendant in error.

BLECKLEY, C. J.—1. The plaintiff below, Holland, being a passenger upon the train, was carried past the station at which he wished to stop. Discovering the fact, he requested the conductor to let him off; and a vital Facts. question in the case was whether he alighted safely, and received his injury afterwards by falling through a trestle on his way back to the station, or whether he fell through the trestle in alighting by reason of being forced or pushed off at that point by the conductor. There is no doubt but that he was seriously injured by his fall, his leg being broken. No one witnessed the fall. He testified in his own behalf, and made a case of gross negligence against the company. The evidence of another witness was admitted, over objection, as to what the plaintiff said in giving an account of the manner of his leaving the train and receiving the injury. When these declarations were made, the plaintiff had pulled off his coat, detached his suspenders, bound up his broken limb, crawled through a culvert from one side of the railway to another, seated himself on the cross-ties, and cried for help. It was late at night. A person who heard his cry reached him about half an hour after first hearing him. To this person the statement was made; and the question is, was that statement a part of the *res gestæ*? We think it was not.

The Code (§ 3773) declares that "declarations accompanying an act, or so nearly connected therewith in time as to be

free from all suspicion of device or after thought, are admissible in evidence as part of the *res gestæ*." It is manifest that the act by which the plaintiff was injured had completely terminated before his declarations were made, and that they were no accompaniment of the same. Were they so connected with it in time as to be free from all suspicion of device or after-thought? He had turned his attention from the act to measures looking to his own safety and comfort. He had certainly occupied his thoughts with something besides the facts and circumstances to which his declarations related. He had full opportunity, although, no doubt, under great suffering, to devise a story in his own interest; and there is no reason for concluding that he did not have capacity to take advantage of his opportunity. He was exposed to the temptation of fabricating a story, if he needed the aid of invention; and the exposure was under circumstances calculated to excite suspicion that his statement was, or might have been, referable to deliberation and after thought, rather than to spontaneous or instinctive utterance. This does not imply that he did fabricate, for he might not have done so. Truth may have been with him, and invention unnecessary. But, as his declarations did not accompany the act, they had to be so nearly connected therewith in time as to be free from all suspicion of device or after thought. *Hall v. State*, 48 Ga. 607. If subject to suspicion at all, they were not admissible, although, in the particular case, the suspicion might be erroneous. In *Augusta Factory v. Barnes*, 72 Ga. 218, the injured person was a child 14 years old, and she died from the injury. Her declarations, made half an hour after the injury was received, were admitted in evidence upon the ground that they were free from suspicion; this court saying: "It is scarcely credible that this little girl, while enduring such excruciating pain—perhaps torture would not be too strong a word to characterize it—from this frightful wound, would have been capable of framing a story with a view to her ultimate advantage of gain, or for any other ulterior purpose." In considering that case afterwards, in *Augusta & S. R. Co. v. Randall*, 79 Ga. 311, 34 Am. & Eng. R. Cas. 439, in which latter case the declarations of a mature woman, not more remote in time, were held inadmissible, the court said: "That case must rest alone upon its own peculiar facts, and will not be extended beyond them. * * * The proximity of time in which declarations are made to the main transaction is not the only test of their admissibility in evidence, but they must also be free from all suspicion of device or after thought." It is obvious that, upon this requisite of freedom from suspi-

Declarations
—Admissibility as *res gestæ*.

cion, the age and discretion of the speaker must be of very considerable importance. We think the doctrine recognized generally by courts, others as well as our own, would require the exclusion of the evidence in this case. A somewhat thorough discussion of the subject will be found in the opinion by EARL, J., in *Waldele v. New York C. & H. R. R. Co.*, 95 N. Y. 274, 19 Am. & Eng. R. Cas 400, the facts of which case were quite as favorable for the admission of the evidence as are those of the present case, and it was ruled inadmissible. See *Estell v. State*, 51 N. J. L. 182; *Chicago, W. D. R. Co. v. Becker* (Ill.), 21 N. E. Rep. 524. An excellent chapter on the topic will be found in Wood, Pr. Ev. 413-480; and see *Mechem*, Ag. § 715. Inasmuch as the evidence of the plaintiff and that of the conductor differed to the degree of direct antagonism upon the principal facts in issue, any illegal evidence may have turned the scale; and the declarations of the plaintiff being, as we have seen, inadmissible, we think a new trial should be had. For this reason the judgment denying a new trial is reversed.

2. The witness Branch, on cross-examination, was interrogated as to conversation in the presence of Collins, and as to conversation addressed to Collins. This was with a view to laying the foundation for impeaching him by the testimony of Collins. His answers, without the explanations which he was allowed to superadd would not show that he might have been misunderstood by Collins as to the former conversation. With the explanation, the answers show plainly that Hitt did the talking, or the most of it, and that Branch responded by nodding his head several times without expressing himself in words. What Hitt said was pertinent to the subject matter to which the cross-examination related; and the nodding of the head by the witness was perhaps ambiguous, meaning either that he understood what Hitt said, or that he assented to some of it as representing the truth of the case. The latter construction might have been put upon it by Collins, and the jury would not have known whether this was correct or not, had not all the facts and circumstances of the conversation been brought to light as the witness detailed them. Indeed, without some of the explanation, they would not have even known that Branch expressed himself in this way at all. Whether Hitt was an agent of the company to talk as he did, is quite beside the question; for the company sought to affect the witness by the part he (the witness) took, or was supposed to have taken, in that conversation, no matter who or what the other interlocutor was. He had a right to show what the part attributable to himself really was; and in order to do so, under the

Impeaching
credibility of
witness.

peculiar circumstances, it was necessary to detail all, or much, of what Hitt said. The general rule as to bringing out the whole of the pertinent matter of a conversation, where a part of it is touched upon, is applicable to the present case with peculiar force; for here the conversation was conducted on one side by words, and on the other chiefly by signs alone.

3. Hitt talked very improperly, and with an evident purpose to corrupt his host, Mr. Branch, as a witness. Collins was with him to hear what was said; and both, it seems, were sent by Bush, Esq., one of the company's counsel, to get up evidence to be used in the case. It does not appear in express terms that the company or that Bush directed or authorized the use of any improper means in the business of getting up evidence, but there can be no doubt that to obtain evidence and prepare for trial is within the scope of the powers of an attorney employed in the defense of a pending case. If Bush himself had used the means to suborn evidence which Hitt used, the fact of his so doing would, it seems to us, have been admissible in evidence; and, if so, we see not why Hitt's conduct under Bush should not be admissible. The court charged fully and fairly as to the presumption that the company was free from complicity in the unlawful and improper conduct, but left the question to the jury as to how the matter really was, both in respect to the agency of Hitt, and his authority from the company to conduct himself towards the witness as he did. There was no proof from Bush or any other witness that Hitt had transcended his authority; and this, together with all the facts and circumstances, could be considered by the jury. The evidence warranted the reference of the whole matter to the jury for their appraisalment of its import and value as a factor in the general case.

4. The point made that punitive damages could not be recovered, because they were not claimed *eo nomine*, is wholly without merit. The declaration lays damages at \$10,000, and alleges a tort, with circumstances that may well be considered as an aggravation. The Code (§ 3066) declares: "In every tort there may be aggravating circumstances, either in the act or the intention; and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." It certainly cannot be necessary for the plaintiff to set out in his declaration, in so many words, that he claims some or all of his damages as punitive. All he has to do is to make a case by his pleading and evidence which will entitle him to such damages, in addition to those actually sus-

Attempt to
corrupt wit-
ness.

Punitive dam-
ages—Plead-
ing.

tained. We find no error in the record, save as indicated in the first division of this opinion. Judgment reversed.

ALBERTI

v.

NEW YORK, LAKE ERIE & WESTERN R. CO.

(*New York Court of Appeals, Second Division, December 17, 1889.*)

Personal Injuries—Care and Treatment—Evidence as to Plaintiff's Circumstances.—Where the defendant in an action for personal injuries, cross examines the plaintiff's witnesses as to the standing of the physicians who attended him, and proves that they were ordinary country practitioners who have no special knowledge of the treatment of persons suffering from injuries similar to plaintiff's, and that there is an eminent physician from New York, skilled in the treatment of such cases, the defendant thereby raises the issue that the plaintiff had not had proper care and treatment, and the plaintiff may offer testimony showing that he was poor and dependent upon his earnings, and consequently could not employ any skilled physician from a distance.

Same—Privilege of Physician—Waiver.—Under the provisions of sections 834 and 836 of the New York Code of Civil Procedure, that a physician or surgeon shall not disclose any information acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity unless the privilege is "expressly waived by" the patient, the privilege is waived when the patient's attorney calls the physician as a witness and states that, as his attorney, he waives it.

Same—Evidence—Probable Duration of Life.—A physician was asked to state what in his opinion would be the result of the disease from which plaintiff suffered. Having given his opinion, he was asked to state the length of time that plaintiff might live in the natural and ordinary course of events. The witness answered that he could only give the probability from the history of other similar cases, and he was permitted to do so. *Held*, that the evidence was competent.

Same—Evidence—Admissibility of Photograph.—During the trial of an action for personal injuries, a physician testified that a photograph showing the manner in which the plaintiff's limbs had been contracted was taken in his presence, and that it correctly represented the condition of the limbs. *Held*, that the photograph was admissible in evidence.

APPEAL from General Term of the Supreme Court, Second Department.

Action for damages for personal injuries. The case was tried at the Orange County Circuit, and a verdict for the plaintiff for \$25,000 was returned. Upon appeal, the general term affirmed the judgment. See 43 Hun. (N. Y.), 421. The defendant appeals.

Lewis E. Carr for appellant.

P. B. McLennan for respondent.

HAIGHT, J.—This action was brought to recover damages for a personal injury. In July, 1885, the plaintiff was a passenger upon the defendant's express train, and was seated in one of the sleeping cars. When the train was near Oxford in the county of Orange, it came into collision with a partially displaced door of a freight car, going in the opposite direction, which broke the windows, and the partition between them, at which the plaintiff was sitting. He was struck by the broken pieces of glass and timber, and so injured that the muscles of the legs contracted in such a way as to draw both legs up against his body, and render him helpless. No question is made but that there was sufficient evidence to take the case to the jury upon the main elements of the cause of action. It is claimed, however, that errors were committed in the rejection and exclusion of evidence which entitles the defendant to a new trial.

The plaintiff and his wife gave testimony to the effect that he was dependent upon his earnings for the support of himself and wife. This was given under the objection and exception of the defendant. As bearing upon the question of damages, we think this testimony was incompetent. The rule of recovery is, compensation for the injuries sustained. Pain and suffering, loss of time, the expense of medical, surgical, and other attendance, and the diminished capacity to earn in the future, are all proper elements to be taken into consideration by the jury in determining the amount of the compensation that should be awarded. But in this regard the law is not a respecter of persons. It makes no distinction between the rich or the poor, and a jury has no right to consider that element in determining the amount of the pecuniary compensation. In the case of *Myers v. Malcolm*, 6 Hill (N. Y.), 292-296, NELSON, C. J., in delivering the opinion of the court, says: "A new trial must be granted in this case for the error of the judge in admitting evidence of the wealth of one of the defendants. This was clearly inadmissible, and it is impossible to say what effect it may have had upon the verdict." In the case of *Moody v. Osgood*, 50 Barb. (N. Y.), 628, BARNARD, P. J. says: "Damages in these cases are not to be estimated by or proportioned to the wealth of the defendant. Indirect proof of the wealth of the defendant is just as inadmissible as direct proof and for the same reasons. To the same effect are the decisions of the supreme court of the United States, and the courts of other states. See *Pennsylvania Co. v. Roy*, 102 U. S. 451-459; *Shaw v. Boston & W. R. Co.*, 8 Gray (Mass.), 45; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Stockton v. Frey*, 4 Gill 406. See, also,

Facts.

**Damages—
Evidence that
plaintiff is de-
pendent on
his earnings.**

2 Thomp. Neg. 1263; Abb. Tr. Ev. 601; Wood, Ry. Law, 1242.

It does not appear to us that this evidence was competent as bearing upon the earning capacity of the plaintiff prior to the injury. It is true that the jury heard the plaintiff's condition described, and saw his wife in the court room, but there was no evidence before them showing the style or manner in which they lived, or the amount that was annually expended in their support, and this could not very well be determined by the jury by a mere inspection of the plaintiff's wife in the court room. The plaintiff had already stated the character and nature of his business before his injury, and subsequently stated the amount of salary that he received. His earning capacity was thus fully made to appear by direct and competent evidence. Nor are we inclined to sustain the admissibility of this testimony upon the theory that it was competent, as tending to prove that the plaintiff, after the accident, was unable to perform any labor. There was but little dispute in reference to his actual condition. It was made to appear from the testimony of eye witnesses and expert physicians who had examined and satisfied themselves as to his condition. We are aware that in the case of *Caldwell v. Murphy*, 11 N. Y. 416, the court there sustained this character of testimony upon the theory that having a family dependent upon him for support, and being without means of support except his labor and the charity of his friends, his omission to employ himself had a bearing upon the extent to which he had been disabled. But we regard that case as carrying the rule to the outside limit, and do not feel justified in following it in this case.

Evidence—
Earning capacity of
plaintiff.

We are thus brought to the inquiry as to whether this evidence was competent for the purpose of showing that the plaintiff used ordinary care to cure and restore himself; that he acted in good faith, and resorted to such means as were reasonably within his reach to make his damages as small as possible. It doubtless would be, in case any such issue was tendered by the pleadings or raised by the testimony. A person who receives an injury through the carelessness of another is bound to act in good faith and to resort to such means and adopt such methods as are reasonably within his reach to cure and restore himself. *Lyons v. Erie R. Co.*, 57 N. Y. 489.

Dependence
on earnings—
Use of ordinary
care to
cure injury.

The answer denied any knowledge or information sufficient to form a belief as to the extent and seriousness of the injury complained of. The first witness sworn upon the trial on behalf of the plaintiff was Jonathan Allen, the plaintiff's father-

in law, at whose residence he had been since the injury. He testified as to the condition of the plaintiff upon his arrival, and on down to the time of the trial, and gave the names of the doctors that had treated him. Upon the cross examination he was asked if the plaintiff at any time since the injury had been under the charge of any physician especially skilled in this class of cases, and he answered that he had not, any more than those he had mentioned, and it appeared that they were ordinary practitioners in the country villages of Andover and Alfred. It was after this testimony was given that the evidence objected to was called out. We do not understand for what purpose the defendant called for this testimony, unless it was his purpose to show that the plaintiff had not had proper care and treatment. The physicians who testified on behalf of the plaintiff were cross examined by the defendant's counsel, and made to admit that they had never seen a case of this kind before, and consequently had no experience in treating such a case. It further appeared that there was an eminent physician in New York by the name of Dr. Seguin, who was skilled in the treatment of diseases of this character. It was undoubtedly proper for the defendant to cross examine the plaintiff's physicians as to their skill and experience in treating diseases of this character, as bearing upon the weight which should be given by the jury to the opinions expressed by them in reference to the durability of the disease, and that evidence did not necessarily tender the issue as to whether the plaintiff had made use of the means reasonably within his reach to cure himself. But no such claim can be made as to the testimony called out from the witness Allen. He was not a physician, and had not been called upon to express any opinion as an expert. The defendant had previously shown by the testimony of this witness that Dr. Seguin was especially skilled in that class of cases, and that he had not been called to treat the plaintiff; thus giving point and character to the testimony that the plaintiff had not been treated by any one especially skilled in such cases. It appears to us that this evidence was sufficient to raise such an issue, and that the trial court was justified in admitting evidence that would tend to rebut and disprove such claim, and that this was done by showing that he was poor and dependent upon his earnings, and was consequently not able to employ or pay a skilled physician to visit him from the city of New York. Upon this theory we are of the opinion that the evidence objected to was permissible.

Dr. Shepard was called as a witness for the plaintiff, and asked to describe to the jury the condition in which he found the plaintiff on the morning after the accident, and what his

condition had been from that time until the present. This was objected to, upon the ground that the question comes within the prohibition of the Code, as a question of privilege. The counsel for the plaintiff conducting the trial then stated that as his attorney he waived the privilege. The objection was then overruled, and an exception was taken by the defendant, and the doctor proceeded to state the condition of the plaintiff. The Code of Civil Procedure provides that a clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs. Section 833. And that a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. Section 834. And that an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment. Section 835. Section 836 then provides: "The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient, or the client." So that, under the provisions of the latter section, there must be an express waiver by the patient in order to make the testimony competent. The question, then, is, can such express waiver be made by an attorney of a person in his lifetime? The death of the client would undoubtedly terminate such agency, and no one would then be permitted to speak for him, and the prohibition provided for by the Code would then doubtless continue forever. *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56. But although dead, he may leave behind him evidence which indicates an express intention to waive the privilege, as, for instance, where he requests his attorney to sign the attestation clause of his will, he by so doing expressly waives the provisions of the statutes, and makes him a competent witness to testify as to the circumstances attending its execution, including the mental condition of the testator at the time. *In re Colman*, 111 N. Y. 220. RUGER, C. J., in delivering the opinion of the court in that case, says: "It cannot be doubted that if a client, in his lifetime, should call his attorney as a witness in a legal proceeding to testify to transactions taking place between himself and his attorney while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute; and can

Privileged
communication
to physician—Waiver
of privilege.

it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts learned through their professional relations upon a judicial proceeding to take place after his death? We think not." If the calling of an attorney as a witness in behalf of his client is an express waiver of the seal of secrecy imposed by the statute, is not also the calling of a physician as a witness by his patient such a waiver? It is true that these remarks of the chief judge may not have been necessary in the decision of that case, and may have been made by way of illustration; still the force of the argument is such as to commend itself to us as a correct and just interpretation of the statute. As we have seen, the physician was not only called as a witness on behalf of the patient, but his counsel who was conducting the trial in his behalf in open court expressly waived the prohibition of the statute. The attorney, in conducting the trial, stood in the place and stead of his client, representing him as his duly authorized agent. All that properly related to the conduct of the trial devolved upon the attorney. It was for him to determine what should or should not be presented as evidence, and it appears to us that he must be deemed to so far represent the client as to be authorized in his behalf to waive the privilege, and remove the seal of secrecy to the evidence that he in his judgment saw fit to offer for and on behalf of his client. The power of an attorney to represent his client was considered in the case of *Mark v. City of Buffalo*, 87 N. Y. 184. In that case the attorneys of the parties had agreed upon the amount that should be paid to the referees before whom the case was tried. The Code fixed the fees of referees at six dollars for each day spent in the business of the reference, unless at or before the commencement of the trial a different rate of compensation is fixed by the consent of the parties. The parties had not agreed upon a greater rate than that provided for by the statute, but their attorneys had, and it was held that, under their employment, they had the power to so agree, and that their clients were bound by their agreement.

Dr. Lewis, another witness sworn on behalf of the plaintiff, was asked to state what, in his opinion, would be the result of the disease in the natural and ordinary course. This was objected to on the ground that there was too much speculation connected with it. The objection was overruled, and an exception taken, and the witness gave it as his opinion that the patient would never be any better, and that he never would be able to straighten his limbs. He was then asked to state the length of time that the plaintiff may live, in the natural and ordinary

Evidence as
to probable
duration of
life.

course of events. This was objected to, and the court ruled that he might answer if he could speak with reasonable certainty in reference thereto. The doctor answered that he could only give the probability from the history of other similar cases, and this he was permitted to do, under the objection and exception of the defendant. It will be observed that as to the latter answer the answer was as to the probability, and that in the former question he was called upon to express his opinion in reference to the result of the disease in the natural and ordinary course. It is claimed that this evidence is objectionable, under the case of *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305, 19 Am. & Eng. R. Cas. 167. In that case the question was as to what might or may develop, and was not as to what would probably or was reasonably certain to develop. This question was considered in the case of *Griswold v. New York C. & H. R. R. Co.*, 44 Hun (N. Y.), 236, affirmed 115 N. Y. 61, and was again considered by us in the case of *McClain v. Railroad Co.*, 116 N. Y. —, and under the rules laid down in these cases we consider the evidence competent.

During the trial the plaintiff's counsel offered in evidence a photograph of the plaintiff, showing the manner in which his limbs had been contracted. This was permitted by the court, under the objection of the defendant. Before the photograph was done, however, one of the doctors testified that it was taken in his presence, and that it correctly represented the condition of the limbs. The only materiality of this evidence was to show the manner in which the limbs of the plaintiff were contracted. In this regard the testimony of the physician is that it was a correct representation of them. This made it competent as a map or diagram. *Archer v. New York, N. H. & H. R. Co.*, 106 N. Y. 589-603. See, also, *Wilcox v. Wilcox*, 46 Hun (N. Y.), 32-38; *Ruloff v. People*, 45 N. Y. 213-224; *Hynes v. McDermott*, 82 N. Y. 50. The judgment should be affirmed, with costs.

Admissibility
of photo-
graph.

BRADLEY, VANN, and PARKER, JJ., concur. FOLLETT, C. J., reads dissenting opinion, and POTTER, J., concurs. BROWN, J., not sitting.

FOLLETT, C. J., (*dissenting*).—This action is for the recovery of damages for a personal injury caused by the negligence of the defendant. On the trial the plaintiff was permitted to prove, against the objection and exception of the defendant, that he depended on his earnings for the support of himself and wife; that he had no other means; and that since December 7, 1885, his

Dependence of
plaintiff on
earnings.

wife had been working what she could for the support of both. It was held in the prevailing opinion that this evidence was not admissible generally, nor on the question of damages, which is well sustained by the authorities cited, and others might be cited. It is sought to sustain in this court the reception of the testimony on the ground (we use the language of the respondent's counsel) "that it was competent for the purpose of showing that the plaintiff used ordinary care to cure and restore himself; that he acted in good faith, and resorted to such means as were reasonably within his reach to make his damages as small as he could." The rule here stated was laid down in *Lyons v. Erie R. Co.*, 57 N. Y. 490, in this language: "When one receives an injury through the carelessness of another, he is bound to use ordinary care to cure and restore himself. He cannot recklessly enhance his injury, and charge it to another. If his arm be broken, he cannot omit to have it set, and charge the loss of the arm to the wrong-doer. He is not obliged to employ the most skillful surgeon that can be found, or resort to the greatest expense to ward off the consequence of an injury which another has inflicted upon him. He is bound to act in good faith, and to resort to such means and adopt such methods reasonably within his reach as will make his damages as small as he can." The rule was reaffirmed in *Sauter v. New York C. & H. R. R. Co.*, 66 N. Y. 50, and must be regarded as a settled rule of law in this state. At this point it is important to inquire whether an issue, that the plaintiff had not used ordinary care to cure himself, had acted in bad faith, and had failed to resort to such means as were reasonably within his reach, was raised on the trial. It is not alleged in the answer that the plaintiff was negligent in respect to the means used to effect his cure, or that his attendants, professional or lay, were incompetent or negligent, and such an issue is not alluded to in the charge, nor do we find any trace of it in the evidence, unless it is contained in that quoted by the respondent's counsel for the purpose of sustaining this ruling, all of which we will now quote.

The first witness sworn in behalf of the plaintiff was his father-in-law, Jonathan Allen, and on the cross-examination he testified: "Alfred Center is a place of from 800 to 1,000 inhabitants. Dr. Shepard is one of the practicing physicians in that place. The country about there is quite thickly settled, for a farming country; farms averaging about a hundred acres to the farm. Dr. Shepard's practice is confined to that locality. *Question.* Some time after this injury, did you make any arrangement for Dr. Seguin to visit Mr. Alberti and examine him? *An-*

Evidence introduced.

swer. We did; yes, sir. *Q.* And about when was that? *A.* Mrs. Alberti can explain that better than I can, for she made the arrangement. I think it was the last of November or first of December—some time along then. *Q.* Did you have anything to do with making that arrangement? *A.* I did. I requested Dr. Hubbard, of Hornellsville, who was one of the consulting physicians, with the advice of others, to send for Dr. Seguin. *Q.* Did you do that because you understood Dr. Seguin was skilled in that class of cases? *A.* We did; yes, sir. *Q.* And was that arrangement made for an examination, with a view of having him treat Mr. Alberti? *A.* Yes, sir; and as I understand it, the day was set for him to come up, but Mr. Alberti got so bad he thought he could not stand the examination, and I requested Dr. Hubbard to telegraph Dr. Seguin to wait further orders, and he did not go then at all, until quite recently. Dr. Shepard has been the attending physician. Dr. Crandall has been one of the consulting physicians. He has practiced at Andover. It is eight miles south of Alfred, on the Erie road. It is a place of about 1,000 inhabitants: it may be more—1,200. Dr. Hubbard we have called once, and Dr. Robinson once. Those were single visits. The treatment has been under the direction of Dr. Shepard. *Q.* Now, has Mr. Alberti, at any time since this injury, been under the charge of any one who was especially skilled in this class of cases? *A.* Well, no more so than these men I have mentioned. *Q.* Than such men in that ordinary practice would be? *A.* Yes, sir; I don't know what their skill is."

The plaintiff was not present at the trial, but his deposition, taken March 26th, 1886, by and pursuant to §§ 872 and 873 of the Code of Civil Procedure, was read in his behalf at the trial, which occurred April 26, 1886. Among other statements, the deposition contained the following: "I depend on my earnings for the support of myself and wife." The defendant objected to the reading of the sentence quoted, "as incompetent and improper," but the objection was overruled, an exception taken, and the sentence was then read.

The plaintiff's wife was sworn in his behalf, (being the sixth witness,) and was asked: "*Question.* Has Alberti any other means of support than what he earns?" This was objected to by the defendant, "as incompetent and improper," but the objection was overruled, an exception taken, and this answer given: "*Answer.* No, sir; he has not. Since the 7th of December I have been working what I could to support myself and him."

Dr. Mark Shepard, plaintiff's attending physician, was sworn in his behalf, and testified, among other things, to his

belief that the plaintiff was incurable. Upon cross-examination, he testified: "*Question.* What you are giving here is simply your opinion, is it not, in answer to these last questions? *Answer.* To these last questions, my opinion; yes, sir. *Q.* And that opinion is based upon your experience since you have been practicing, in part, is it not? *A.* Well, in a very small part; yes. *Q.* In part is it based upon what you had learned in regard to the human system and the various diseases before you commenced to practice? *A.* In part; yes. *Q.* Is it based upon anything except those two? *A.* Yes, sir; I commenced practicing in the spring of 1878. I graduated at the University of the City of New York in the spring of 1878. I immediately commenced my practice at Alfred and Alfred Center. I attended this university two winter courses. During the time I have been practicing there I have not had under my charge another case like this. This is the first case of this kind that has come under my medical observation. When I came to see Mr. Alberti, on the morning of the 25th of July, the examination revealed to me something I had not observed before in my medical experience. *Q.* And it has in its various stages—I mean in this case—developed those things which you had never observed or known of in your medical experience before? *A.* Yes, sir. *Q.* Then, in your treatment of this case, there was nothing in your medical experience which guided you, was there? *A.* Yes, sir; there was. My general knowledge of the treatment necessary with troubles with the spinal cord, congestion, and *meningitis*. *Q.* Did you ever have a case of *meningitis*. *A.* Oh, yes; lots of them."

[Dr. William M. Crandall, the physician who had been called in consultation with Dr. Shepard, was sworn in behalf of the plaintiff, and testified that in his opinion it was very doubtful whether the plaintiff could ever recover. Upon cross-examination, he testified: "I practice medicine at Andover, N. Y. This is seven miles from Alfred. Andover is a place of not over a thousand inhabitants. There is a country district around there. My practice has been confined mostly to that locality. I have not had occasion, in my medical experience, to treat a case like this, because no two cases are exactly alike. Have had occasion to treat cases of *meningitis*, cerebro-spinal *meningitis*. I believe this to be a case of *meningitis*; that is my opinion in regard to it. I have seen others besides myself treat cases of *meningitis*. Have advised them with reference to them. Dr. Lewis, who was sworn here as a witness yesterday, Dr. Baker, Dr. Harmon,—well, I don't know, I should be bothered, may be, to think of them all. They are physicians in the locality in which I live. I don't think

any of them ever made diseases of that kind a specialty. *Question.* Then, have you ever seen the treatment of a case of this kind or of this class by some physician who made a specialty of diseases of that character? *Answer.* No, sir; I don't know as I can say I have."

Smith Ely, a physician residing at Newburgh, made an examination of the plaintiff April 1 or 2, 1885, in connection with Drs. Lewis, Crandall, and Shepard, and was sworn as a witness in behalf of the plaintiff. He testified, on cross-examination: "I don't say that it is impossible that he should recover. I don't think there is any doubt but that there was no lesion of the cord. There is some doubt whether the membranes were actually inflamed. I think the symptoms point to that. *Question.* Who is the best qualified to express an opinion on that subject,—the ones who have made it a special study for life? *Answer.* Yes; I should think they would. *Q.* Is Dr. Seguin recognized as a standard authority on matters of that kind in this country? *A.* Yes, he is. *Q.* And you think he would be well qualified to express an opinion on those matters? *A.* Yes, of course. *Q.* You have heard the testimony here in regard to Alfred Center, and you saw the place there yourself. Isn't it a fact that, in ordinary country practice, in a case of this character, which required special treatment, the ordinary method is to put him under the hands or charge of some one who has special knowledge in that direction?" Objected to by the plaintiff as incompetent and immaterial. The objection was sustained, and the defendant excepted. It is possible to infer that this question was asked with reference to raising the issue that the plaintiff had been negligent in not employing a physician having special skill and experience in the treatment of injuries like the plaintiff's, but this question was excluded by the court.

We have now quoted all the evidence referred to by the respondent's counsel for the purpose of sustaining this ruling, and we think it very clearly shows that no such issue as is now sought to be introduced into the case was presented on the trial. All of this evidence was given before the plaintiff rested. The defendant called four physicians,—Drs. Seguin, Stillman, Robinson, and Nye. The first three acquired their knowledge of the plaintiff's condition by being called in consultation by him, and Dr. Nye gave no evidence of consequence.

But two issues were contested at the trial: (1) Were the plaintiff's injuries caused by the actionable negligence of the defendant? (2) the extent of the injuries sustained, and the probable duration of the consequences. To this second issue all of the medical testimony was directed, and none of it

tends to show that the plaintiff was negligent in the means adopted for his cure, or that such a position was taken by the defendant at the trial; and it seems to us plain that this so-called "issue" has been raised out of the record for the purpose of avoiding the effect of the ruling discussed. The judgment should be reversed, and a new trial granted, with costs to abide the event.

POTTER, J., concurs.

WALLACE

v.

WESTERN NORTH CAROLINA R. CO.

(North Carolina Supreme Court, December 21, 1889.)

Contributory Negligence—Burden of Proof—Validity of Statute.—A statute placing the burden of proving contributory negligence upon the defendant in an action for damages for personal injuries, affects only the remedy and impairs no vested right, and is within the legislative authority.

Damages—Evidence—Plaintiff's Net Earnings.—Although the amount which the plaintiff, in an action for personal injuries, was earning previous to the injury may be shown as affecting the amount of damages, evidence as to the net earnings of the plaintiff in the exercise of his trade, is inadmissible.

Same—Measure of Damages.—In an action for damages for personal injuries, the plaintiff is entitled to recover one compensation for all injuries past and prospective, in consequence of the defendant's wrongful or negligent acts, including indemnity for actual nursing, medical expenses, and loss of time, or loss from inability to perform labor or capacity to earn money; he is entitled to a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering, both of the body and mind, resulting immediately and necessarily from the injury.

APPEAL from Superior Court, McDowell County.

Action to recover damages for personal injuries sustained by the plaintiff whilst a passenger upon one of defendant's trains. The following errors of law were assigned by the defendant: (1) The court's refusal to allow the defendant to ask the plaintiff what his net earnings were in the exercise of his trade. It was competent upon the question of damages to be assessed in favor of the plaintiff. (2) The court's refusal to instruct the jury, as required in the fourth instruction prayed by the defendant, that it was "usual and proper for a passenger to remain in his seat, and especially so on freight trains, while being transported." (3) The court's refusal to instruct the jury, as prayed in the fifth instruction

of defendant, "that if the plaintiff, by remaining in his seat could have avoided the injury, and his getting up was the cause of the same, then he contributed to his injury by his negligence." (4) The court's refusal to instruct the jury, as requested in the sixth prayer of defendant: "There being no dispute about the fact that the plaintiff did get up from his seat, and was injured by reason thereof, the court should find as a proposition of law that he contributed to his injury by his negligence, and direct the jury to find the second issue in favor of the defendant." (5) The court's refusal to instruct the jury, as prayed, "that there is no evidence that the locomotive was overloaded." (6) The court's refusal to instruct the jury, as prayed in the eighth prayer of defendant, "that, in assessing the damages the plaintiff is entitled to recover, the jury should award the plaintiff compensation only for the injuries he suffered." (7) The refusal of the court to instruct the jury, as prayed in the ninth prayer of the defendant, "that the burden of proof, in the light of the evidence in this case, is upon the plaintiff to show negligence on the part of defendant, because there is excited in the mind of the court by his (plaintiff's) evidence a suspicion of contributory negligence on his part; and, further, in the light of the evidence in the case, the burden of proving contributory negligence is not upon the defendant, but upon the plaintiff to disprove the same. This is so, because the plaintiff's own evidence does raise a suspicion of negligence on his part." (8) The laying down to the jury in the court's charge abstract propositions, without applying the principles to the facts in this case. (9) In not saying to the jury there was no evidence of the length of the train, it only being shown it was a long train. (10) In not instructing the jury they could not consider, on the question of damages to which he was entitled, what plaintiff has paid for medical aid and nursing. The court should have gone further than to say there was no evidence of the amount paid. Defendant appeals from a verdict for the plaintiff.

D. Schenck and Busbee & Busbee for appellant.
Batchelor & Devereux for appellee.

CLARK, J.—When this case was here the first time (98 N. Car. 494, 34 Am. & Eng. R. Cas. 553), the evidence being substantially the same as now sent up, the court held Case stated. that the judge below erred in instructing the jury that there was no evidence of contributory negligence, and that such issue should have been submitted to the jury. When the case was again before this court (101 N. Car. 454, 37 Am. & Eng. R. Cas. 159), while it went off upon another

point, the same exceptions to the charge were made substantially as now, and this court said: "In respect to other assignments of error, we are of opinion that there was evidence to go to the jury tending to prove that the locomotive was overloaded, and of careless management of it; that the court could not properly instruct the jury, in the light of all the evidence, that the injury sustained by the plaintiff was the result of a mere accident; nor should it have been said to them that, in view of all the evidence, the plaintiff could not recover; nor that, accepting the plaintiff's own evidence as true, he was chargeable with contributory negligence." As the evidence now is almost literally the same, with the addition by plaintiff of the omitted fragment of testimony which then procured the defendant a new trial, we think that this is conclusive of all the points raised by defendant's assignment of errors applicable to the first and second issues, except the seventh and eighth.

The statute (chapter 33, Acts 1887) places the burden of proving contributory negligence upon the defendant. This only affects the remedy, and impairs no vested right. It was competent for the legislature to enact it. It was not error to refuse to charge, as asked by defendant: "In the light of this case, the burden of proving contributory negligence is not upon the defendant, but upon the plaintiff to disprove the same." Nor do we think the charge is open to the objection urged in the eighth assignment of error. His honor's charge was a careful application by him of the principles of law appropriate to the different phases of fact as they should be found by the jury.

It is urged, however, there was error in the court's refusal to allow defendant to ask the plaintiff what his net earnings were in the exercise of his trade. *Kesler v. Smith*, 66 N. Car. 154. What plaintiff's accumulations had been was an immaterial matter. He might have chosen to spend his earnings or to hoard them. That could not affect the measure of the damages sustained by him by his injury. Nor would it make any difference whether he had a large family dependent on him or not, except in cases where the circumstances entitle the plaintiff to recover exemplary damages. 2 Wood, Ry. Law, 1242. An inquiry as to his earnings in his business is competent. It is not itself a rule of damages. There are many other elements of damages to be considered, and, upon all the circumstances, it is for the jury to say what is a reasonable and fair compensation which the defendant should pay the plaintiff by way of compensation for the injury he has

Burden of
proof—Con-
stitutionality
of statute.

Evidence as to
plaintiff's net
earnings.

sustained. Lord COLERIDGE in *Phillips v. London & S. W. R. Co.*, 42 Law T. (N. S.) 6. In the same opinion, which is a very clear and able exposition on this subject, his lordship directs the attention of the jury to the amount of plaintiff's earnings as one of the material circumstances to be considered by them. In *Nash v. Sharpe*, 19 Hun (N. Y.), 365, PRATT, J., says: "Evidence of the nature and extent of the party's business, or how much he was earning from his business, or realizing from fixed wages, is proper upon the question of damages." "The age and occupation of the injured person; the value of his services; that is, the wages which he has earned in the past, whether he has been employed at a fixed salary or as a professional man—are proper to be considered." 2 Wood Ry. Law, 1240, and cases there cited. The rule is indeed well settled, and, had the jury been cut off from the information which could properly be brought out by the inquiry, it would have been our duty, without disturbing the findings of the jury upon the first two issues, to have directed a new trial upon the issue as to the amount of damages as was done in *Burton v. Railroad*, 84 N. Car. 192. But upon examination of the record we find that the plaintiff had replied, immediately before the excluded inquiry, to a question by defendant's counsel: "At that time, I was getting \$1.50 per day and board. I was always at work, the weather permitting." This, we take it, was a clear statement that his net earnings were \$1.50 per day, when the weather permitted, in his trade of brick-layer and plasterer." If the question excluded was intended to repeat the inquiry already answered, it was no error to exclude it. If it was meant by it to inquire what were his net earnings at his trade after supporting himself and family, it was incompetent. That a man's wages may all be required in the support of his family, without leaving him any "net" earnings, in no wise diminishes his damages in losing his capacity to earn them. If the object was to show that \$1.50 was more than his usual earnings, the question should have been so framed or this purpose stated by counsel.

As to the sixth assignment of error, the court charged the jury: "In this class of cases the plaintiff is entitled to recover as damages one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing, and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money. Plaintiff is to have a reasonable satisfaction (if he is entitled to recover) for loss of both bodily and mental powers, or for act-

Measure of
damages.

ual suffering both of the body and mind, which are the immediate and necessary consequences of the injury." And added: "There is no evidence, however, offered that anything was paid for actual nursing, or any amount was paid for medical attendance. You need not consider these items in making up your verdict, should you arrive at that point."

The proposition of law laid down seems to be a *verbatim* quotation from 3 *Suth. Dam.* 261, and is sustained by the numerous authorities there cited. Nor upon an examination of the record do we find any ground to sustain the tenth assignment of error. The court, it seems, instructed the jury not to consider those items in making up their verdict, if they should come to that issue. No error. Affirmed.

RICHMOND & DANVILLE R. CO.

v.

CHILDRESS.

(*Georgia Supreme Court, April 13, 1889.*)

Personal Injuries—Physical Examination of Plaintiff—Discretion of Court.

—It is within the discretion of the trial court to require the plaintiff, suing for a physical injury alleged to be permanent, to submit to an examination by competent physicians at the instance and at the expense of the defendant in the action, to ascertain the nature, extent, and probable duration of the injury, so as to afford means of proving the same at the trial. By *Ga. Code*, § 206, every court has power to control, in furtherance of justice, the conduct of all persons connected with a judicial proceeding before it, in every matter appertaining thereto.

ERROR from Superior Court, Fulton County.

Pope Barrow and Jackson & Jackson for plaintiff in error.

Gartrell & Ladson and *J. T. Glenn*, *contra*.

BLECKLEY, C. J.—Childress, a lad 13 or 14 years of age, recovered a verdict, against the railroad company for \$3,500, on account of a personal injury alleged to be permanent. The seat of the injury was the chest. The company made a motion for a new trial on several grounds, the fourth being as follows: "Because the court erred in declining to order the examination of Childress by physicians to be appointed by the court on motion of defendant before the jury was impaneled, but after the case was called for trial, for the purpose of determining whether or not he had been permanently injured as claimed, the said defendant offering

to pay the expense of such examination by the physicians selected by the court." The court ruled that it had no power to order the examination without the plaintiff's consent. We understand the court as putting the refusal solely upon the ground of a defect of power.

The Code (§ 206,) declares that "every court has power * * * to control, in furtherance of justice, the conduct of its officers, and all other persons connected with a judicial proceeding before it, in every matter ap-
 Power of court to order examination of plaintiff's person.

pertaining thereto." It can certainly admit of no doubt that, in a proper case for such examination, the cause of justice would be subserved by it, and the decided weight of modern authority is that courts have such power. A very full and clear statement of the matter is found in 1 Thomp. Trials, § 859. The language of the author is as follows: "In modern trials of civil actions for physical injuries, the question has frequently arisen whether the court has power to order an inspection of the body of the plaintiff or person injured, for the purpose of ascertaining the nature and extent of the injuries. Some of the courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat, in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection. Other courts, taking the more enlightened view, that the object of a judicial trial is to enable the state to establish and enforce justice between party and party, have held that it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon an application seasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to compel the plaintiff or injured person to submit to it. Another court has held that, where the plaintiff in such an action alleges that his injuries are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon, based upon a personal examination, unless there is already an abundance of expert evidence; in which case the court, in its discretion, may refuse to order an examination. Another court has ruled that the trial court may require the plaintiff in such an action to submit to a medical examination, and dismiss his action, if he refuses to comply with the order. This conclusion may be placed upon the higher ground that, when a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The conception of

the nature and objects of a judicial trial which denies to the defendant, under proper safeguards, the right of such an inspection, is not higher than that of the old law, which would not even compel a party to produce a deed or private paper in a civil case, where it was intended to be used in evidence against him—a rule which the court of chancery invaded, to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence." The cases cited *pro* and *con* are: *White v. Milwaukee City R. Co.*, 61 Wis. 536, 18 Am. & Eng. R. Cas. 213; *Walsh v. Sayre*, 52 How. Pr. (N. Y.), 334; *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 629; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375; *Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 10 Am. & Eng. R. Cas. 783; *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130, 18 Am. & Eng. R. Cas. 292; *Sibley v. Smith*, 46 Ark. 276; *Shaw v. Van Rensselaer*, 60 How. Pr. (N. Y.), 143; *Neuman v. Third Avenue R. Co.*, 50 N. Y. Sup. Ct. 412; *Roberts v. Ogdensburg & L. C. R. Co.*, 29 Hun (N. Y.), 154; disapproving *Walsh v. Sayre*, 52 How. Pr. (N. Y.), 334, and *Shaw v. Van Rensselaer*, *supra*. See *Sidekum v. Wabash, St. L. & P. R. Co.*, 93 Mo. 400, 30 Am. & Eng. R. Cas. 640.

As to the suggestion made in argument, that the rule would operate hardly upon delicate and modest females, we can only say that they would be safely guarded by the discretion of the trial judge. There would be no danger, we think, in this country, of an examination being ordered needlessly, or where an improper shock to modesty or feelings of delicacy would be likely. We decide simply that the power exists, and that in each case it is to be exercised or not, according to the sound discretion of the presiding judge. We think there ought to be a new trial in the present case. As we deal only with the question of power, we forbear to enter into the nature of the showing which ought to be required as preliminary to its exercise, further than to say that generally there should be a request made of the plaintiff before the trial comes on to submit to the examination applied for; for the plaintiff's refusal to do so should be verified, as also should the probability that examination would likely result in some material discovery or disclosure. When the examination is compulsory, there is obviously propriety in the experts being selected by the court rather than by one or both of the parties. It is likewise obvious that all the expenses should be borne by the party at whose instance the examination is made. Judgment reversed.

Submission of Person to Inspection of Experts.—See *Missouri Pac. R. Co. v. Johnson* (Tex.), 37 Am. & Eng. R. Cas. 128; *Owens v. Kansas City, St.*

- J. & C. B. R. Co. (Mo.), 33 *Id.* 524; Sidekum *v.* Wabash, St. L. & P. R. Co. (Mo.), 30 *Id.* 640; Chicago & E. I. R. Co. *v.* Holland (Ill.), 30 *Id.* 590; International & G. N. R. Co. *v.* Underwood (Tex.), 27 *Id.* 240, note 245; Louisville, N. A. & C. R. Co. *v.* Falvey (Ind.), 23 *Id.* 522; Sioux City & P. R. Co. *v.* Finlayson (Neb.), 18 *Id.* 68, note 77; White *v.* Milwaukee City R. Co. (Wis.), 18 *Id.* 213, note 216; Atchison, T. & S. F. R. Co. *v.* Thul (Kan.), 10 *Id.* 783, note 791.

GULF, COLORADO & SANTA FE R. CO.

v.

HATHAWAY.

(*Texas Supreme Court, January 10, 1890.*)

Damages—Judgment Over Against [Co-Defendant.]—Where two railroad companies are sued for damages for personal injuries sustained in a collision, one of the defendants may ask for a judgment over against its co-defendant upon the ground that the latter was solely responsible for the accident.

Same—Sufficiency of Verdict.—In an action against two railroad companies for negligence causing personal injuries, where one of the defendants asks judgment over against its co-defendant, a verdict in the following terms: "We the jury, find for the plaintiff against the G. R. Co., find for S. R. Co., damages to the amount of \$4,000," is unobjectionable.

APPEAL from District Court, Fort Bend County.

J. W. Terry for appellant.

Parker & Pearson and *Brady & Ring* for appellees.

HENRY, J.—Appellee instituted this suit against appellant and the Southern Pacific Company, both railroad corporations, to recover damages. Plaintiff charged that he was a passenger on a train being operated by the Southern Pacific Company, when it came in violent collision with a locomotive engine obstructing the track, causing the car in which he was riding to be derailed and wrecked; that, in order to avoid the apparent danger of being crushed in the wreck, he jumped from the wrecked car, and was, without fault on his part, permanently injured by having his ankle terribly wrenched and sprained. The petition alleges that the obstruction of the track was caused by the servants of appellee, who negligently pushed the obstructing engine so near the track over which plaintiff was being transported as to cause the collision, and that the Southern Pacific Company was guilty of negligence in failing to discover and remove the obstruction before the arrival of the colliding train.

Among other defenses the Southern Pacific Company

pleaded that plaintiff's injury was caused solely by the gross negligence of its co-defendant, and it prayed that, if any judgment was rendered against it in favor of plaintiff, judgment over be rendered in its favor against its co-defendant for the amount of such verdict. Appellant excepted to the answer of its co-defendant seeking judgment over, upon the grounds that it was not a plaintiff, and not entitled to such relief in this proceeding. It is contended that the court erred in overruling this exception, but it is not stated in what the error consisted, and we can see no satisfactory reason why such relief may not be administered if the evidence shall justify it.

The jury returned a verdict, reading: "We, the jury, find for the plaintiff against the G., C. & S. F. Rwy. Co., find for Southern Pacific Company, damages to the amount of (\$4,000.00) four thousand dollars." Upon this verdict the court rendered judgment in favor of plaintiff against appellant for the amount specified in the verdict, and discharging the Southern Pacific Company, with costs. Appellant complains that the verdict is "unintelligible, indefinite, and uncertain." We think the objections are well taken. Without the aid of the pleadings we think the verdict would be construed to be in favor of the Southern Pacific Company for the amount of damages given, and would not show what was found in favor of plaintiff against appellant. As both plaintiff and the Southern Pacific Company pray for the same money judgment against appellant, the pleadings do not remove the difficulty produced by the phraseology of the verdict. It is true that the verdict does not show that the only contingency upon which a verdict was asked by the Southern Pacific Company arose. It is not difficult to make verdicts express the conclusions of the jury, and while they may be liberally aided by the contents of the record, and enforced, when, if so aided, there can be no uncertainty as to the intention of the jury, mere conjecture cannot be resorted to. In this case we are not able to give to the verdict, aided by the pleadings or the charge of the court, a construction that will support the judgment. *Moore v. Moore*, 67 Tex. 297. The other questions raised by the assignment of errors are not such as are likely to occur on another trial. The judgment is reversed, and the cause remanded.

**Judgment-
over.**

**Sufficiency of
verdict.**

DUKE

v.

MISSOURI PACIFIC R. CO.

(Missouri Supreme Court, December 21, 1889.)

Personal
injury
money
damages
physical
injury
damages

Injuries—Damages—Professional Services—Instructions.—An instruction to compensate plaintiff if there were expended "large sums of professional services, physicians and nurses" does not authorize to allow for professional services other than those of physicians and nurses.

Damages—Liability for Expense of Treatment.—Where the evidence shows that plaintiff after the accident was treated in a hospital, and it does not appear that she expended any sum for services or medicines, or incurred any express liability therefor, or a liability *quantum meruit* upon an implied *assumpsit*, there is a failure of proof to support an allegation in the petition, that the plaintiff "expended a large sum of money for professional services of physicians and nurses, and for drugs," and a recovery therefor is not warranted.

APPEAL from Circuit Court, Lafayette County.

Robt. Adams and T. B. Buckner for appellant.

A. Comingo and Andrews & Lee for respondent.

BRACE, J.—This is an action for damages for personal injuries, alleged to have been sustained by the plaintiff while a passenger on one of defendant's passenger trains, caused by the derailment of the train, and the overturning of the car in which plaintiff was seated, and its precipitation down an embankment, through the negligence of the defendant's servants. The jury found for the plaintiff, and assessed her damages at \$5,000.

1. No errors are assigned on the admission or exclusion of evidence. The instructions, as a whole, presented to the jury not unfavorably to the defendant the measure of care which a carrier of passengers is required to exercise, and defendant, in the argument, concedes that there was evidence given which, under proper instructions, would authorize a verdict for the plaintiff; but complains that "the amount of the verdict, under the evidence, is such as to justify the belief that the jury were misdirected." So that, practically, the only questions to be inquired into in this case arise upon the instructions given upon the subject of damages and the amount assessed. The allegation of damages in the petition is "that, on account of said injuries, it was necessary for plaintiff to expend, and she did expend, a large sum of money for professional services

Instructions
as to measure
of damages.

of physicians and nurses, and for drugs, to-wit, one thousand dollars, and was damaged in bodily pain, anguish, and suffering, and in the permanent injury of her hip and ankle, and the loss of her suit of hair, in the sum of twenty-five thousand dollars." So much of the instruction for the plaintiff as bears upon the question of damages, and to which objections are urged, is as follows: "And if you further believe that, on account of such injuries, it became and was necessary for plaintiff and that she did expend large sums of money for professional services, physicians, and nurses, and also for drugs and medicines, and that, from the overturning of the train as aforesaid, she suffered mental anguish and bodily pain, and was, as to the physical parts of her body heretofore mentioned, permanently injured and disabled, and that the overturning of said car in which the plaintiff was seated as a passenger was the direct and proximate cause thereof, you will find for the plaintiff, and assess her damages at such sum as will, in your opinion, compensate her therefor, not to exceed twenty-five thousand dollars." The criticism upon the wording of this instruction—that it authorizes the jury to allow for professional services other than those of physicians and nurses—is not well founded. The words "physicians and nurses" are in apposition with the words "professional services" in the sentence, and the meaning is the same as if the sentence read "professional services *i. e.*, physicians and nurses services," and is no more than equivalent to the expression "professional services of physicians and nurses," as used in the petition.

2. The principal objection urged against the instruction is, however, that it authorizes the plaintiff to recover for "large sums of money expended for such services, and for drugs and medicines," when in fact the evidence fails to show that any sum whatever was expended therefor. A careful and critical examination of all the evidence in the case, as it appears in the 175 pages of appellant's printed abstract, has been made, and it must be conceded that this objection is well grounded. It appears from the evidence that the plaintiff, after the accident, was attended by physicians in a hospital in Kansas City, and that drugs and medicines were administered to her, and from her condition and surrounding circumstances that she must have received the benefit of such nursing as her situation required; but it nowhere appears that she ever expended a single dollar for such services or medicines, or that she ever incurred any express liability therefor; and if, by reason of the circumstances, she did incur a liability *quantum meruit* therefor, upon an implied *assumpsit*, or if, perchance, they were bestowed gratuitously,

Recovery for
professional
services—
Treatment in
hospital.

or paid for by a stranger, yet there is no evidence whatever showing the value of the professional services rendered, or of the drugs and medicines furnished, for which the jury are instructed to compensate her in damages. There was an entire failure of proof as to the allegation in the petition that the plaintiff "expended a large sum of money for professional services of physicians and nurses and for drugs," under the most liberal construction that can be placed upon it; and it was error in the court to instruct the jury as if there was evidence in the case in support of that averment. "Instructions must be confined to the case made by the evidence within the issues defined by the pleadings." 2 Thomp. Trials, § 2309; *White v. Chaney*, 20 Mo. App. 389; *Waddingham v. Hulett*, 92 Mo. 528; *Lester v. Kansas City, St. J. & B. R. Co.*, 60 Mo. 265. Where there is no evidence showing the amount or the proximate amount, of expenses incurred for medicines, medical attention, or like services, the jury have no basis upon which to form an estimate of the damages that ought to be assessed on account thereof; and damages of this kind cannot be found except upon such proof. *Reed v. Chicago, R. I. & P. R. Co.*, 57 Iowa 23, 12 Am. & Eng. R. Cas. 107; *Eckerd v. Chicago & N. W. R. Co.*, 70 Iowa 353, 27 Am. & Eng. R. Cas. 114; *Crowley v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 119; 2 *Shear. & R. Neg.* (4th Ed.) § 759. Where compensatory damages only are given, the recovery must be confined to the actual damages sustained, (*Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582;) and when such damages are susceptible of proof with approximate accuracy, and may be measured with some degree of certainty, they should not be left to the guess of the jury, even in actions *ex delicto* (*Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286; *Pritchard v. Hewitt*, 91 Mo. 547; *Thomp. Trials, supra*, § 2077.) When so left, it is impossible to tell to what extent the verdict may have been affected by the vague estimates the jury may have placed upon values concerning which there was no proof; consequently it is impossible to say the defendant was not prejudiced by this erroneous instruction on the question of damages, and for such error the case must be reversed and remanded for new trial. All concur.

MISSOURI PACIFIC R. CO.

v.

MITCHELL.

(Texas Supreme Court, November 12, 1889.)

Personal Injuries—Pleading—Damages for Inconvenience.—An allegation in a petition in an action for damages for injuries caused by the derailment of a train, that by the derailment the plaintiff was put to great inconvenience, and delay; that he was expected at a certain place at a certain day, but was unable to reach it; that the weather was bitterly cold, and the place of accident was not near any house, and he was forced to walk to a town for shelter and suffered greatly thereby, and that by reason of said inconvenience and delay, he was damaged to the sum of, etc., is too indefinite to warrant the recovery of any sum for inconvenience.

Same—Instructions—Future Damages.—Where the court at defendant's request has charged that "to entitle plaintiff to recover for future damage, there must be a reasonable certainty as to such future damage—a mere probability of its future occurrence is not enough," an instruction asked as part of the same, that "future damages can only be awarded when it is rendered reasonably certain from the evidence that such damages will eventually and necessarily result from the original injury," is properly refused.

Same—Instructions—Admission of Evidence.—Where a physician has testified without objection by the defendant, that plaintiff had assured him that he had never suffered with sore eyes or been injured in his eyes, a direction to the jury not to consider the evidence of symptoms of injury merely stated by plaintiff to his physician, is properly refused, the objection being taken too late.

Same—Damages—Attorney's Fees—Expenses Attending Courts.—Where attorney's fees, or expense incurred by plaintiff in attending court to prosecute a suit, are not alleged in the proceedings or included in the evidence as elements of damage, a request by the defendant to charge that the jury should not include in their estimate of actual damages such expense, is properly refused.

Same—Derailment—Evidence of General Defective Condition of Roadbed and Previous Wrecks.—Where plaintiff sues for injuries caused by the derailment of a train, evidence in regard to the general defective condition of the railroad on which the wreck occurred, is not admissible, even upon the issue of exemplary damages, nor is evidence of previous wrecks elsewhere admissible, the liability of the defendant for damages of any kind being dependent only upon the condition of the road at the time and place of occurrence.

APPEAL from District Court, Upshur County.

Action for damages for personal injuries. Defendant appeals from a judgment for the plaintiff.

Whittaker & Bonner for appellant.

H. Chilton for appellee.

HENRY, J.—Appellee brought this suit to recover damages for personal injuries received by him in a wreck of one

of defendant's trains, on which he was being conveyed as a passenger, at a point between Tyler and Troupe.

The petition charges that the roadbed between the two places named, as well as at the place of the wreck, was out of order, in bad condition, and unsafe for the transportation of passengers thereon: that the ties, at the place of the derailment, were old and rotten, the iron rails were worn and broken, and the track was out of level,—all of which contributed to and caused the wreck. The petition charged that plaintiff's expense for medical attention, to which he was subjected in consequence of his injuries, amounted to \$100; that the value of time lost by him amounted to \$500; and that, by his physical and mental suffering, he had been damaged \$10,000. He prayed for \$20,000 as exemplary damages. The petition contains also the following additional allegation: "Plaintiff further charges that by said derailment he was put to great inconvenience and delay; that he was expected at the city of Tyler on the said 26th day of December, 1887, but was unable to reach said city; that the weather was bitterly cold, and the place of the accident was not near any house, and that he was forced to walk back to the town of Troupe for shelter, and suffered greatly thereby; and that, by reason of said inconvenience and delay, he was damaged in the further sum of five hundred dollars."

Petition.

The court, in its charge to the jury, directed them to take into consideration the injuries of defendant on account "of mental pain and physical suffering; his loss of time, medical bills, and his inconvenience." The defendant specially excepted "to all allegations in the petition claiming five hundred dollars for inconvenience and delay, because they are vague, and do not show with sufficient certainty facts that entitle plaintiff to recover such damages." The exception was overruled by the court. Over the objection of defendant, plaintiff was permitted to prove, by many witnesses, that the International & Great Northern Railroad bed and track between Troupe and Tyler, and also between Tyler and Lindale, at and before the time of the wreck, was in bad condition; that many ties were rotten, and the iron greatly worn; and that several wrecks of freight and other trains had occurred between said points. The bill of exceptions taken by defendant to the ruling states that the evidence was offered by plaintiff to show gross negligence under his claim for exemplary damages. At the request of defendant's counsel, the court charged the jury "not to find exemplary damages against defendant, merely because of the alleged bad condition of the railroad bed, and track, and not to consider any evidence of the bad condition of the track and roadbed at other places than where the wreck oc-

Damages for
inconvenience
—Pleading.

curred, if the wreck was caused by a broken rail." The jury found a verdict for actual damages only. The petition charged the damages claimed resulted from the "inconvenience and delay," and the charge directed the jury to consider "inconvenience" as one of the grounds of damage. The plea does not state a cause of action with the required precision, and the exception should have been sustained, and the charge referring to it ought not to have been given.

The court, at the request of the defendant, charged as follows: "To entitle plaintiff to recover for future damage,

Future damages—Instructions. there must be a reasonable certainty as to such future damage; a mere probability of its occurrence is not enough." Defendant asked the court

to give the following as part of the same charge; "Future damages can only be awarded when it is rendered reasonably certain from the evidence that such damages will evidently and necessarily result from the original injury:" which the court refused. We think the discrimination made by the court was correct.

Dr. Walker, a witness for plaintiff, among other things, testified as follows: "I am positive plaintiff is permanently injured in his spine, and can demonstrate it to the jury. He has a nervous twitching in his right eye, and the eye itself indicates some spinal affection. I examined his eye before, and found the trouble, and he assured me he had never suffered with sore eyes or been injured in his eye. He will never get well. He will constantly grow worse." This witness had, on a previous examination, given strong testimony to the effect that plaintiff had suffered a permanent spinal injury, while other expert witnesses had expressed opinions, to some extent, challenging the correctness of his conclusion. This evidence was admitted without objection, but afterwards defendant's counsel requested the court to charge the jury to not consider "evidence of symptoms of injury not testified to by plaintiff, but stated by him to Dr. Walker." We think the evidence was improper, and, if it had been objected to when offered, it ought to have been excluded. The objection, however, came too late when interposed for the first time in the form of a charge to the jury, and the court properly refused to give the charge.

The defendant requested the court to charge the jury not to include in their estimate of actual damages any expense for attorney's fees or expense incurred by plaintiff in attending court to prosecute his suit. Such damages were not alleged in the pleadings, or included in the evidence, and a charge upon the subject was properly refused.

Damages—Attorney's fee—Expenses attending court.

It is claimed that the verdict for \$7,500 actual damages is excessive. As the cause will be reversed upon another ground, and as neither the verdict nor the evidence may on another trial correspond with what it was upon the trial under review, we deem it improper to discuss this assignment. The evidence with regard to the general condition of the International & Great Northern Railroad, on which the wreck occurred, between Troupe and Lindale, ought not, under the circumstances of the case, to have been admitted upon the issue of exemplary damages, or for any other purpose. The question of the liability of the defendant for damages of any kind should have been confined to the condition of the road at the time and place of the occurrence, and all issues as to the condition of the road elsewhere, as well as of previous wrecks elsewhere, ought to have been carefully kept from the jury, in whatever form they were presented. *Missouri Pac. R. Co. v. Johnson* (Tex.), 10 S. W. Rep. 328; *Missouri Pac. R. Co. v. Shuford*, *Id.* 411. As will be seen by the charge we have quoted, all evidence of this character was excluded, by the charge of the court, from the consideration of the jury for all purposes. While we think the introduction of such evidence, and especially of such a mass of it, as we find in the record, was highly improper, yet, if the admission of the evidence was the only error shown by the record, then, in view of the fact that it was admitted only on the issue of exemplary damages, and as the jury were instructed not to consider it under that issue, and as the jury gave no verdict for exemplary damages, we would not reverse the cause for that reason. For the errors committed in overruling defendant's exception to the petition, and in giving the charge on the same subject, the judgment is reversed, and the cause remanded.

Evidence as to
general condi-
tion of rail-
road.

CITIZENS' STREET R. CO.

v.

TWINAME.

(*Indiana Supreme Court, January 7, 1890.*)

Personal Injuries—Loss of Wife's Services—Husband's Right of Action.—The provision of Ind. Rev. St. 1881, § 5130, that a married woman may carry on a trade and perform labor on her separate account, and that the earnings of any married woman from trade, services or labor "other than labor for her husband or family" shall be her separate property, does not create any liability on the part of the husband to pay for services rendered to him by the wife; and where the husband was engaged in the millinery

business, and his wife devoted her services to the business for his benefit without any contract or expectation of pay therefor, he may recover damages for loss of such services by reason of personal injuries sustained through the negligence of another.

APPEAL from Superior Court, Marion County.

Action for damages for the loss of the services of plaintiff's wife by personal injuries, to her caused by defendant's negligence. Defendant appeals from a judgment for the plaintiff.

H. C. Allen for appellant.

Miller & Elam for appellee.

OLDS, J.—This action was brought by the appellee against the appellant in the court below for damages sustained by the appellee on account of alleged injuries received by his wife while she was a passenger on appellant's car. By the complaint the appellant sought to recover for medical attendance furnished, and loss of service and the society of, his wife. It is alleged with particularity in the complaint that before and at the time of the injury the plaintiff was carrying on a large and profitable millinery business, in which his wife was acting as the manager, and that the business was rendered more lucrative and profitable by reason of her personal services in the management of said business, and her services were of great value to the plaintiff, to-wit, \$2,000; that by reason of the injury she had been unable to perform such duties as she was accustomed to perform in the management of said business, whereby the plaintiff had suffered damage. Issue was joined by answer in general denial, and trial had resulting in a verdict and judgment for the appellee. On the trial of the cause evidence was admitted, over the objection of the appellant, as to the value of the services of the wife of the appellee in the capacity in which she served the appellee as fore-woman, and the court instructed the jury to the effect that, if the plaintiff was the sole owner of the store, and his wife served him as fore-woman or manager of the store, the plaintiff would be entitled to recover whatever loss, if any, he had sustained on account of being deprived of his wife's services, in whole or in part, in his household affairs or business, by reason of her disability.

It is contended by counsel for appellant that the plaintiff cannot recover for the services of his wife as a clerk or assistant in his business; that the right of the husband to recover damages for loss of services of the wife is limited to services within the household; that by the statute (section 5130, Rev. St. 1881) "a married woman may carry on any trade or business, and perform any labor or services, on her sole and sep-

Right of husband to damages for loss of wife's services.

arate account. The earnings and profits of any married woman accruing from the trade, business, services, or labor, other than labor for her husband or family, shall be her sole and separate property," and that the wife is entitled to recover for her own services. This statute in no way changes the situation between husband and wife. It neither attempts to exonerate her from the performance of any proper services for the benefit of the husband, either in the household or in his business, nor does it attempt to create any liability on the part of the husband to pay for such services. It very properly makes the wife sole owner of her earnings, when she performs services for persons other than her husband, and of profits made from any trade or business carried on by her. It enables the wife, if she chooses so to do, to carry on a trade or business on her own account, and to perform services for persons other than her husband, and in such cases she is the owner of the profits and earnings. The statute was passed to remedy an evil, and, when the wife is compelled to support herself or her family by engaging in business on her own account, or performing labor for persons other than her husband, or where circumstances exist making it desirable, and for the best interest of the family, that the wife engage in business, to give to the wife in such cases the same right to control her business and earnings as if she were sole; but it in no way affects or changes the marital relations, and the statute has no application in a case where the wife is not carrying on a separate trade or business, or performing services for persons other than her husband. The wife has the same right to give to her husband her services either in the household or in his business as she had before the passage of the statute, and the same obligation rests upon her to discharge her duty to her husband, and upon the husband to discharge his duty and obligation to his wife, as did before its passage. We have under consideration a case not in any way affected by the statute. The husband was engaged in the millinery business, and his wife, by reason of their marital relations, devoted her energy and services to the business for the benefit of the husband without any contract or expectation of pay for her services, and she sustained an injury on account of the negligence of the defendant, and by reason of which the husband was deprived of her services in his business, which the wife was accustomed to perform, but was prevented from performing by reason of the injury. There might be circumstances existing which would entitle the wife, in an action for damages, to recover for the value of her own services, but *prima facie* the husband is entitled to recover for such services, and especially this is true when

the wife is not engaged in carrying on any trade or business on her own account, or performing labor for persons other than her husband, and, on the contrary, is voluntarily rendering service for the benefit of the husband; and he is entitled to recover as well for one class of services as another. In other words, the husband is entitled to recover for the damage sustained on account of the loss of the services of the wife, and the value of her services, and loss sustained by reason of her inability to perform them, must necessarily depend on the character and value of the services which she is capable to perform, and is accustomed to perform for the husband. *Ohio & M. R. Co. v. Crosby*, 107 Ind. 32, 27 Am. & Eng. R. Cas. 339; *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155, and note, 163; *Cramer v. Reford*, 17 N. J. Eq. 367, 90 Am. Dec. 594, and note, 601; *Cregin v. Brooklyn Cross-town R. Co.*, 75 N. Y. 192; *Seitz v. Mitchell*, 94 U. S. 580; *Harrington v. Gies*, 45 Mich. 374; 9 Am. & Eng. Encyc. Law, p. 817, § 8. There was no error in the rulings of the court in the admission of the evidence or instructions to the jury.

It is contended by counsel for appellee that the record is informal and presents no question for the decision of this court; but, taking the view we have of the only material question involved, and having to affirm the judgment, we do not deem it necessary to pass upon the question presented by the appellee as to the sufficiency of the record. Judgment affirmed, with costs.

BREESE

v.

TRENTON HORSE R. CO.

(*New Jersey Supreme Court, February 20, 1890.*)

Passengers—Pleading—Allegation as to Duty to Carry.—In a suit against a street-car company, a count alleged that the plaintiff was "on" a car, and thereby it became the duty of the company "to guard, protect, and secure" the plaintiff while leaving the car. *Held*, that the count was bad, as it failed to show any facts giving rise to such duty.

Same—Trespasser.—Another count alleged that the plaintiff was "on" a car, and that it thereby became the duty of the company to safely and securely carry him, etc. *Held*, bad, as the plaintiff might have been on the car as a trespasser.

Same—Allegation of Negligence.—A count charging in general terms that the car of the defendant, by the carelessness of the management of

those having it in charge, ran over the body and arm of the plaintiff, was sustained.

Demurrer to *narr.*

S. D. Oliphant, Jr., and George M. Robeson for plaintiff.

Gilbert Collins for defendant.

BEASLEY, C. J.—There are six counts in this declaration, five of which are demurred to. We think the second and fourth counts are plainly bad. The following facts constitute the *gravamen* of each, viz., that the plain- Declaration.
tiff "was on" one of the street cars of the defendant, "and thereupon" in the language of the pleader, "it became and was the duty of the said defendant to guard, protect, and secure the said Edward Yard Breese in dismounting, descending, getting down, and removing himself from the said car; yet the said defendant, not regarding its duty in that behalf, did not use due and proper care to guard, protect, and secure the aforesaid Edward Yard Breese, whereby," etc.

It will be observed that from the fact that the plaintiff was in a car of the defendant, it being a common carrier of passengers, the duty was imposed on it "to guard, protect, and secure" the plaintiff in the transac- Allegation as to duty of company to plaintiff.
tion of his leaving the car. But this description of the duty of the company is not the statement of a fact. It adds no force whatever to the case laid in the record, and therefore may, without loss, be always omitted; for it is simply and exclusively the pleader's averment of the legal efficacy of the facts stated. Obviously such construction can have no effect on the mind of the court. With the facts before us, we ourselves must ascertain their legal force. In the present instance, we think the conclusion of the pleader is a plain *non sequitur*. From the mere fact of the presence of the plaintiff in the car of the defendant, it was not the legal consequence that an obligation arose on the part of the company "to guard, protect, and secure" the plaintiff when "dismounting, descending, getting down, and removing himself from the said car." The only service, in the particular in question, to be rendered by the carrier to even its fare-paying passengers, is to stop its car, on request, for a reasonable time, at a proper place; and, having done this, the duty "to guard, protect, and secure" the passenger in the act of leaving the car is incumbent, not on the carrier, but on the passenger himself. The fault of these counts is that they do not show, by a statement of facts, that the duty which they assert has been violated has any existence. The rule upon the subject is thus stated by Addison in his work on Torts: "'The decisions' observes

Lord Campbell, 'show that the allegation of duty in declaration is in all cases immaterial, and ought never to be introduced; for if the particular facts set forth raise the duty, the allegation is unnecessary, and if they do not it will be unavailing.' If the particular facts stated in the declaration do not raise the duty, it cannot be established by other facts not stated. The declaration therefore must stand or fall by the facts stated. Negligence creates no cause of action unless it expresses or establishes some breach of duty." 2 Add. Torts, § 1338. As to each of these counts, the demurrer is sustained.

The third count propounds a different proposition. Its allegations are to the effect that the plaintiff "was on" the defendants car, and that it thereby became the duty of the latter to use due and proper care so that the plaintiff should be safely and securely carried so long as he remained on the car. A breach of that duty is then averred. Here the question is presented whether, from the mere presence of a person in the car in question, a duty to carry safely was *ipso facto* imposed on the car company. We think that here, again, the duty averred is not shown to exist. Presence in the car will not *per se* raise such duty; and the consequence is that when mere presence is stated, and negligence is stated, a cause of action to even a common certainty is not shown. The allegations, according to the familiar rule, are to be taken most strongly against the pleader, and the court cannot help a defective statement by a conjectural addition. The ground of the plaintiff's case must be his legal presence in the car, that is, he must have been there either as a fare-paying passenger, or at the least as a licensee; and, if this be so, one or the other of such legal characteristics is an indispensable fact in the constitution of his right to sue. This is not a matter of defense. Presence plus the legality of such presence is the groundwork of the plaintiff's case, and one of these essential factors is here omitted. If the plaintiff was unlawfully in the car, the company did not owe to him any duty springing from the fact that he was in the car. In such a condition of things, the defendant could not be held liable for mere nonfeasance. It would have been responsible only for its malfeasances. A person, says Judge COOLEY, "who steals a ride cannot insist that it is a duty to him to run its trains with care." Cooley, Torts, 792. That negligence which does not constitute a breach of duty is not actionable has been exemplified in many cases. Price v. New York R. & Trans. Co., 31 N. J. Law, 229; 2 Add. Torts, § 1338; Cooley, Torts, 792. The fifth count falls under the same criticism. With respect to both, the demurrers must be severally sustained.

Duty arising
from presence
on car.

The sixth count is loosely drawn; but, on the whole, we think it may stand. It states substantially, though in general terms that, by the careless management of the car in a public street by the agents of the defendant, it thereby ran over the "body and arm" of the plaintiff. It need not appear with much particularity how the tort was committed. 1 Redf. R. R. 602. On this count the plaintiff is entitled to judgment.

Allegation of negligence.

SHACHERL

v.

ST. PAUL CITY R. CO.

(*Minnesota Supreme Court, November 18, 1889.*)

Street Railway—Alighting from Moving Car.—It is not negligence *per se* for a person to get on or off a street car drawn by horses while it is in motion. It depends upon the circumstances surrounding each case, and the question is ordinarily one of fact to be submitted to the jury.

APPEAL from District Court, Ramsey County,

Action to recover damages for injuries sustained by plaintiff whilst alighting from a street car belonging to the defendant. The plaintiff alleged that the defendant negligently refused to stop its car when requested, and that whilst he was alighting, the car was carelessly and suddenly moved forward with a jerk, throwing him to the ground and injuring him. The jury returned a verdict for the plaintiff and the defendant moved for a new trial, assigning among other grounds, newly discovered evidence. The defendant appeals from the order denying the new trial.

H. J. Horn for appellant.

Marvin & De Celle for respondent.

COLLINS, J.—There is no claim in this case that the testimony was not sufficient to justify the jury in declaring that defendant was negligent in its management of a street car at the time the plaintiff received the injuries complained of, and while he was a passenger. But the appellant contends that this same testimony shows that the plaintiff was guilty of contributory negligence in attempting to alight from the car while it was in motion. It is well settled that it is not negligence *per se* for a person to get on or off a street car drawn by horses while it is in motion. It depends upon the circumstances surrounding each case, and the question is or-

Negligence—Alighting from moving street car.

dinarily one of fact, to be submitted to the jury. *M'Donough v. Metropolitan R. Co.*, 137 Mass. 210, 21 Am. & Eng. R. Cas. 354; *Conner v. Citizens Street R. Co.*, 105 Ind. 62, 26 Am. & Eng. R. Cas. 210; *Eppendorf v. Brooklyn City & N. R. Co.*, 69 N. Y. 195. The conditions attending such an act might, from the undisputed testimony, appear so unfavorable as to warrant a court in holding, as a matter of law, that recklessness and negligence were apparent in the attempt. But such was not the case at bar, and on this point the trial court did not err.

Nor was there error in its refusal to grant a new trial upon the ground of newly discovered evidence. The force of the affidavit first made by the proposed witness, Brunson, used by defendant upon its motion, was greatly destroyed by his second affidavit, procured and used in rebuttal by plaintiff. The evidence remaining in the affidavit after its modification was either cumulative—that is, additional evidence to support the same point and of the same character—or immaterial, or tending merely to impeach and discredit plaintiff and the witness Preining. Nor was it likely to change the result. Order affirmed.

New trial—
Newly discovered evidence.

Passenger Injured while Alighting from Street Car—Admission of President of Company as to Driver's Negligence.—In an action against a street railway company by a passenger injured while alighting from one of its cars, evidence that the president of the defendant company, not present when the accident occurred, had told the driver that he was discharged on account of the plaintiff having been thrown from his car, is not admissible as tending to show that the accident was the result of negligence. *Lombard & S. S. Pass. R. Co. v. Christian*, Pa. Sup. Ct., Febr. 4, 1889.

Boarding Moving Street Car—Contributory Negligence.—According to plaintiff's own testimony, he was injured while attempting to get on one of defendant's cars while it was still in motion. His left arm was encumbered with his coat and dinner bucket when he placed his foot on the step. The motion of the car caused his foot to slip, and having only his right arm free he was unable to hold on, he fell off and was injured. The only negligence alleged on the part of the driver was in loosening the brake when the plaintiff stepped on the car. *Held*, that plaintiff was guilty of contributory negligence and could not recover. *Reddington v. Philadelphia, Traction Co.*, Pa. Sup. Ct., Febr. 3, 1890.

Street Railway—Passenger—Personal Injuries.—Plaintiff testified that while he was travelling upon an open summer car, the seats of which ran across the entire width of the car, the entrance being at the sides, he sat down at the end of the seat where he entered, and afterwards he rose from his seat, the car being still in motion, for the purpose of signaling the conductor to stop the car. The wheels of all the street railway cars extend above the level of the car floor. In an open or summer car, the wheels are covered where they extend above the floor by sheathing, which is for the most part under the seat but which extends a short distance beyond it. The sheathing is not hidden, but can be seen by any one who looks at the spot. Whilst attempting to attract the conductor's attention, plaintiff

stumbled over the sheathing and fell off the car. *Held*, that the evidence did not show negligence on the part of the street railroad company and that plaintiff could not recover. *Farley v. Philadelphia Traction Co.*, Pa. Sup. Ct., Jan. 20, 1890.

ASHTON

v.

DETROIT CITY R. CO.

(*Michigan Supreme Court, December 28, 1889.*)

Street Railway—Alighting from Moving Car—Fear of Insult.—Where plaintiff, a lady, who was travelling upon a street car, was injured by leaving it whilst in motion, when entering the car barn, she may testify that she was exposed to insult upon a former occasion upon a car which drove into the barn, and that she feared a repetition of the insult; and whether she was justified in leaving the car whilst it was in motion after she had rung the bell and the driver had looked round but refused to stop it, is a question of fact for the jury.

Same—Driver's Knowledge of Previous Insult.—The knowledge of the car driver or the company of the previous insult offered to plaintiff is immaterial, and does not affect her right to a recovery.

Same—Admission of Evidence—Harmless Error.—Plaintiff's husband testified that the morning after his wife was hurt, he saw the superintendent of the barn and told him of the injury and that she would sue if she did not recover, and that the superintendent replied that he did not care how quickly she sued. He also testified that he called at the barn on the night of the accident, and saw some one in the barn whom he supposed to be the watchman, and asked for the superintendent and what cars had gone out. *Held*, that the admission of the evidence, even if erroneous, was not prejudicial to the defendant and did not justify a reversal.

Personal Injuries—Nature—Evidence.—Where a physician has testified that the plaintiff complained of pain in her knee, he may be questioned as to the manner in which she described the pain and how she acted.

ERROR to Circuit Court, Wayne County.

Brennan & Donnelly and *Sidney T. Miller* for plaintiff in error.

H. C. Wisner for defendant in error.

SHERWOOD, C. J.—Mrs. Ashton, the plaintiff in this case, on the 10th of February, 1887, lived on the south side of the Milwaukee Railroad, near Ferry avenue, in the city of Detroit, and was about 54 years of age. On the evening of that day, between 7 and 8 o'clock, she took a Russell-street car, at the corner of Brush and Alfred streets, to go to her home, which was a short distance beyond the end of the line, on Ferry avenue. The barns on Ferry avenue were some distance from the end of the line, and when the car approached the barn, instead of carrying plaintiff on to

Facts.

the terminus of the line, the driver turned and drove the car into the barn a number of car-lengths, and when she left the car in the barn she was assailed by a man at the barn, who laid hold of her, and made indecent proposals to her, until she broke away from him, and ran to her home, thereby escaping from his further violence and insults. The plaintiff further claims in her declaration that, on the 23d of May next following, she was again a passenger on this same line of cars, between 6 and 7 o'clock in the evening, at which time it was light outside. This time, as before, she intended to ride to the end of the line, and again the car turned into the barn, as it had on the evening in February. She remembered her experience at that time, and rang the bell to stop the car. Finding that it did not stop, she waited a second, and then went out on the rear platform, and got off while the car was in motion, being thrown by so doing, and injuring her knee. It was at this time so light that she could see far into the barn. For the injury to the knee she brought suit, and (after a demurrer to the declaration had been overruled) on the trial recovered \$500. When she rung the bell the driver looked back, but drove on, not heeding the bell, or making any effort to stop the car. The plea was the general issue. Defendant brings error.

Nine errors are assigned. The first is to the overruling of the demurrer. The defendant did not choose to stand on this, but pleaded issuably after it was overruled, and we cannot consider this further.

When Mrs. Ashton was on the stand as a witness she was asked, (referring to her experience on the 10th of February in the barn:) "Will you state to the jury what happened when you alighted from the car in the barn?" This was offered as a reason for justifying her leaving the car while in motion; to show that the place to which she was being taken by the company was one not only improper for ladies, but to the plaintiff it had proved to be dangerous. This is the second error assigned. The circuit judge was right in receiving the testimony. The fact that the driver did not respond to the ring of the bell was to the lady a suspicious circumstance, and to what extent she had cause to fear and did fear danger approaching as she neared the barn were proper subjects for the consideration of the jury, and were properly left to them. The third error assigned was to the plaintiff's testifying that she had fear of insult and injury if taken to the barn, and to the effect that the insult she received there before had upon her. I have no doubt of the competency and relevancy of this testimony as it was received.

Evidence as to
circum-
stances at-
tending leav-
ing of car.

The fourth error assigned relates to the statements of Dr. Gustin, who was called to treat the plaintiff for the injuries she received from her fall on leaving the car. He stated she complained of pain in the knee. He was then asked: "How did she describe the pain? and how did she act, if you can describe her actions, not telling what she said? There could be no valid objection in showing her injury to make these inquiries. The physician could only inform the jury of her condition from what she told him and what he saw himself, and the conclusion he reached from the examination he made, and the questions called for no more than this, and the answers were entirely proper. I think the question here raised was substantially passed upon in *Johnson v. McKee*, 27 Mich. 471; *Elliott v. Van Buren*, 33 Mich. 49; *Mayo v. Wright*, 63 Mich. 42.

Declarations
of plaintiff as
to pain.

Mr. Joseph Ashton, the husband of plaintiff, was sworn in the case, and examined in behalf of plaintiff. He testified that he called at the barn next morning after his wife was hurt, and saw the superintendent of the barn, and told him of the injury to his wife, and told him she would sue the company if she did not get better, and the superintendent said to him: "I don't care how quick she sues." He also testified that he called at the barn the night the accident occurred, after his wife had got home and told him of her injury, and saw some one come in the barn that he supposed to be the watchman, and asked him for the superintendent, and something as to the case there, and what cars had gone out, and told about his wife's being thrown from the car. This testimony was all objected to by counsel for the defendant, and is made the subject of defendant's fifth, sixth, and seventh assignments of error. It is a little difficult to see in what manner the defendant could have been prejudiced by anything that was said on these occasions referred to. It certainly could not jeopardize the defendant's interests to give its agents notice that a lady had been insulted upon its premises, or that the plaintiff had sustained injury on its cars through the negligence of its servants in failing to stop the car at the proper place, and allow her to alight, and this was the substance of all the testimony objected to. It may have been irrelevant and erroneously received, but, so far as I have been able to discover, the error was a harmless one.

Declarations
of superintendent—Relevancy.

The defendant's eighth assignment of error is the exceptions of its counsel to the rulings of the court in refusing to give each of the following six requests to charge: (1) The jury are instructed that, under the pleadings and proofs, the plaintiff cannot recover. (2) The rule of law is that to justify the

Instructions requested by defendant. plaintiff in descending from a moving car, and taking the risk of injury incident thereto, and, in case of injury resulting therefrom, hold the defendant liable therefor, such act must be for the purpose of avoiding an actual impending danger produced by the defendant for which it would be legally responsible, and the insult to the plaintiff on the evening of February 10th was not sufficient in law to justify the plaintiff in the belief that she was avoiding an actual impending danger produced by the defendant in descending from the car on the evening of May 23d, as testified to by her. (3) The mere act of turning the car into the barn would not justify the plaintiff's getting down from the moving car, and if the jury should find that on February 10, 1887, plaintiff had been insulted in the street-car barn by some unknown person, it would not in law be sufficient to justify her in descending from the moving car in the manner and under the circumstances testified to, and the defendant cannot be held liable therefor. (4) Under the pleadings in this case, there can be no recovery on behalf of the plaintiff. (5) The jury is instructed that, even though they should believe that the plaintiff was insulted by some unknown person in the defendant's barn on the evening of February 10th, as testified to by plaintiff, still that would not be sufficient in law to make the company liable for the injury sustained, if any, by getting off the car as testified by her, on the 23d of May. (6) The plaintiff must show that the driver of the car on which she was riding, or the defendant, knew that she had been insulted on the 10th of February in the barn, and that there was reasonable ground for believing that if she again went into the barn on the 23d of May, she would be subject to some danger of like character." The last error assigned is to that portion of the charge of the court reading as follows: "If, the plaintiff on the evening of February 10th, was carried by the car into the barn, and there assaulted as testified to by her, and on account of that treatment on the evening of May 23d, seeing the car leaving the main track, and again turning to go into the barn, and she had reasonable cause to fear danger to herself, or repetition of such treatment, and controlled by such fear, to save herself, she attempted to get off the car while in motion, using such reasonable care and caution as she was able to use under the circumstances, and was then injured, the defendant is liable for the injury. That is true, gentlemen of the jury. If, as I said before, she used that reasonable caution at this time and place, as testified to by her, and she used that reasonable caution which a prudent person would use under the circumstances, fearing a repetition of the assault that was committed on February 10th.

then, gentlemen of the jury, of course that will remove the bar which otherwise would rise on account of what would be contributory negligence. She had a right to do it, and it was her duty to do it, if those things were so. If the defendant, by its wrongful act, put the plaintiff in a position where she had reasonable cause to apprehend danger to herself, she had the right to take such steps from said danger as, in her judgment, formed from the exigency of the moment, was best, and, if injured, defendant was responsible for the injury."

The first request was properly refused. The case was one for the jury. In regard to the second request, I think whether or not the treatment the plaintiff received in the defendant's barn when she was taken there was sufficient to justify her belief that she was avoiding an actual impending danger, into which she was being taken, by leaving the car, was a question for the jury, and not for the court, and the request was properly refused. And what is here said applies with equal force to the defendant's third request, and equally justifies the ruling of the circuit court. In regard to the fourth request, as we have already said, the case was one for the jury, and the court would not have been justified in directing the verdict. The fifth request should not have been given. Independent of other facts in the case, it does not properly present to the jury the subject to which it refers, and its tendency would be to mislead, rather than enlighten, the jury, and it was properly refused.

In regard to the sixth request, it was of no consequence what the car-driver or his employer knew or believed in regard to the insult offered to the plaintiff in defendant's barn on the 10th of February. The real question was, assuming the testimony of the plaintiff to be true, what reasonable ground had she to expect she would receive insult or injury, and is she to be deemed negligent in doing the only thing which was left for her to do, by the action of the defendant, in avoiding such insult and injury? The request was properly refused. The court committed no error in giving the charge he did, contained in the last assignment. The case went to the jury under a fair and reasonable charge, and the record presents no error, and the judgment must be affirmed. The other justices concurred.

Knowledge of
previous in-
sult.

Assault by Driver of Street Car—Cessation of Contract of Carriage—Scope of Employment.—A passenger on a street car to whom the driver, who was also conductor, had used profane and abusive language, replied: "When we get to the office of the company I will report you," the office being at the stables, where the car stopped for a change of horses. Before reaching the stables the passenger got off, intending, as he said, to go to the office of the company and report the driver while the horses were being changed, and then to resume his seat in the car, but such intention was not

communicated to the driver. The driver seeing the passenger going towards the office of the company, stopped the car, and jumping off, went across the street, intercepted the passenger on the sidewalk and violently assaulted him. In an action against the railroad company by the passenger to recover damages for the injuries he had sustained, it was *held*, that, when the assault was committed, the contract of carriage had ceased: that the wrongful act of the driver was not within the line and scope of his employment, and the railway company, his employer, was not answerable therefor. *Central R. Co. v. Peacock*, 69 Md. 257.

METROPOLITAN STREET R. CO.

v.

MOORE.

(*Georgia Supreme Court*, October 11, 1889.)

Street Railway—Passenger—Child Travelling on Car with Driver's Knowledge.—A child nine years of age who was carried several blocks, the driver (who was also conductor) knowing him to be on board, was a passenger, whether he intended to pay fare or not, and was entitled to the diligence due to passengers of his age and discretion.

Same—Negligence—Leaving Platform.—It was negligence for the driver needlessly to withdraw from the front platform, leaving the plaintiff and another boy thereon, and it was negligence not to be there ready to stop the team when the plaintiff fell or was thrown by the other boy off the platform upon the track in front of the car, the two boys engaging in a scramble to drive the horse, the reins having been left within their reach.

Same—Contributory Negligence—Excessive Damages.—Though it is apparent that the plaintiff contributed to the injury, this court cannot be certain, on the facts in evidence, that the damages were excessive, the injury being immeasurable by a court as to pain and suffering, and the damages found being \$5,000.

ERROR from Superior Court, Fulton County.

Butler Moore, by his next friend, sued the railway company, for personal injuries. According to his evidence, he was nine years old at the time of the injury, had been up town to procure some meal for his mother, which he intended to send home by the driver of one of defendant's cars, got on the car, and rode for some distance on the front platform. Had no money to pay his fare. Was not going to ride, but the driver told him to get up. Did not tell the driver he was not going to pay, or did not want to ride, but told him to stop the car, and when he stopped got on it. After the car had proceeded some distance, the driver went inside, and sat down to eat his breakfast. He did not stop the car, and left nobody to drive the mules which were pulling it. A negro boy about 10

years old and plaintiff were on the front platform, and the negro started to drive. Plaintiff asked to be allowed to drive. The negro said nothing, but pushed plaintiff off. He caught to the front piece of the car, and was thrown under it. Two of its wheels ran over both of his legs. He was picked up by the driver, and carried home by some colored men. Stayed in bed a number of weeks, and suffered most excruciating pain, his legs being terribly mashed and broken. Has recovered his health, but his legs are badly bent and twisted, and permanently deformed. Probably the muscles and bones will never be as strong as they otherwise would have been. He lost a year from school. He still suffers, and is likely to suffer, some pain from the injury, especially in damp weather. His capacity for earning money was reduced one-fourth, according to the estimate of one of his witnesses. Plaintiff had ridden on cars, and generally paid his fare, thought he would get on and have a ride unless the driver told him to get off, and put his bundles down on the floor of the front platform. When he stopped the car, he was going to tell the driver to carry the meal home, and the driver said, "Get up there, sore toe;" but said nothing to him about paying his fare, and he had ridden on this driver's car without paying any. Was walking along, and the driver stopped, and he got on. The driver did not ask him to pay then. Other drivers on that line had carried bundles for him, but he did not think this driver ever had. The car was going up grade at the time of the injury. Dragged plaintiff six or eight feet before the first wheel struck him, eight or ten feet further before the second wheel passed over him, and went about twenty feet before it stopped. The driver jumped out, caught the brake, and stopped it. He did not know plaintiff was off until the wheels ran over him. From what one witness saw, the negro had not pushed plaintiff at all. Witness thought plaintiff went to step off, and stepped too far. Plaintiff testified that he did not tell anybody after he was hurt that he was tussling over the lines, and that the negro shoved or pushed him off, and that he did not remember cursing the negro, or telling him that he would have his father to shoot him for pushing him off. The car could have been stopped in two yards or less, with the brake. The testimony for defendant tended to show that from the effect of the injury there was a shortening of the right leg from about a quarter to a half inch, and the left leg was considerably bowed outward, and was somewhat larger than the right leg; that a large scar had been left on the right thigh; that plaintiff seemed to walk remarkably well, limped some, but that could be avoided by an extra sole on his shoe, perhaps one thickness of leather, which would not

interfere with his walk; that, considering his age and the compensating power of nature, he would be practically almost as strong as anybody, and his capacity to earn a living not be materially lessened; and that the deformity would always exist, and, so far as lifting and getting about were concerned, he would not be as strong as before, though the strength of the bones was not impaired. Witnesses testified that after the plaintiff was run over he charged the negro with having pushed him off the car, and cursed him, etc. A witness had known the driver, Robinson, to ask boys to ride with him, and to let them stand upon the front platform with him while he was driving, but he did not know whether Robinson allowed them to ride free or not. He was sitting near the door of the car, within reach of the brake, and the car was going slowly at the time of the injury. By the rules of defendant, the drivers drove continuously for some length of time, with no opportunity to stop and eat, and thus they were compelled to eat their meals on the cars. The negro had paid his fare. Plaintiff waved the driver to stop the car, and ran up as though he thought it was not going to stop. The driver told him to wait and he would stop, and plaintiff got on, laid his bundles down, went inside, where he stayed for a short time, and then came out on the platform. The first the driver knew of the accident he felt the car jump, and he put on the brakes at once. He had not heard a word pass between the boys. After the accident, he took a policeman and went to the little negro's house, and hunted for him, but could not find him. The driver did not know but that plaintiff would pay his fare, and took it for granted he would pay it. He always had paid, and never rode on this car without paying. He did not say anything to the driver about carrying the bundles, and himself walking. If the driver had been standing with his lines in his hands when the boy was pushed or fell off, he did not know whether he could have stopped the car or not. After he got to the brake he stopped it in six feet. It had already run over the boy. After verdict for the plaintiff, a new trial was moved for and refused, and the defendant excepted.

Haygood & Douglas for plaintiff in error,

Hopkins & Glenn and *J. M. Slaton* for defendant in error.

BLECKLEY, C. J.—1. The authorities on the subject are ample to show that the plaintiff was entitled to the rights of a passenger, and, being a child only nine years of age, he had upon the driver's diligence a claim in accordance with his tender years. *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Pittsburgh, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421; *Muehlhausen v. St.*

Plaintiff entitled to right of passenger.

Louis R. Co. 91 Mo. 332, 28 Am. & Eng. R. Cas. 157; *Brennan v. Fair Haven & W. R. Co.*, 45 Conn. 284; *Wood, Mast. & Serv.* (2d Ed.) p. 636. § 319; *Beach, Contrib. Neg.* § 93; *East Saginaw St. R. Co. v. Bohn*, and notes, 12 Am. Law Reg. (N. S.) 745.

2, 3. The other points in the case are disposed of with sufficient fullness in the head notes. Judgment affirmed.

CHICAGO WEST DIVISION R. CO.

v.

INGRAHAM.

(*Illinois Supreme Court, January 21, 1890.*)

Negligence—Pleading—Misjoinder of Causes.—Where the defendant files no demurrer to the complaint, a recovery of damages for injuries sustained both by plaintiff and by his horse and buggy in a collision with a street car, may be had, although the claim to both is set up in one count.

Same—Instruction—Cause of Injury.—When the jury have already been instructed as to the degree of care required of plaintiff and the negligence of the defendant requisite to give a right of action, an instruction that "the mere omission on the part of the defendant to perform any duty which it ought to perform, is not sufficient to render the defendant liable, unless such omission caused the injury complained of" is not misleading.

Street Railway—Collision with Buggy—Right to Use of Track.—Where an action is brought to recover damages for injuries sustained in a collision between a street car and a buggy, an instruction that a company operating a street railway is entitled to the track on meeting foot passengers or other vehicles, is misleading, as justifying the belief that the company was not bound to exercise due and proper care to prevent collision with others using the same.

Same—Evidence—Impeaching Credibility of Witness.—In such action, where the conductor has testified that he saw the accident, and upon cross examination stated that he did not say shortly after it that he could not see the plaintiff, testimony that he could not see the accident is admissible.

APPEAL from Appellate Court, First District.

Action for personal injuries. The court at the defendant's request, refused to give the following, the ninth instruction asked by it, "The jury are instructed, as a matter of law, that a company legally operating a street railway is entitled to the track on meeting foot passengers or other vehicles, and inasmuch as the street cars can only go on a part of the line, and when one or the other is compelled to give the right of road that foot passengers or those travelling by ordinary methods, must yield it to street cars," but gave it in a modified form. Defendant appeals from a judgment for the plaintiff.

W. B. Keep, Edmund Furthmann and H. H. Martin for appellant.

Hynes & Dunne for appellee.

SHOPE, C. J.—This was an action on the case by appellee, to recover damages to his person and property claimed to have been sustained through the negligence of appellant's servants, whereby a collision occurred between a car on appellant's railway and the buggy in which appellee was riding. The declaration contained a single count. It alleged, in apt form, that appellee was riding on West Twelfth street, in Chicago, in a buggy drawn by a single horse; and, while in the exercise of due care and caution on his part, the servants of defendant, appellant, so carelessly and negligently drove and managed the horses by which a street car upon defendant's tracks was drawn that the car struck the buggy of appellee with great force, whereby he was thrown to and upon the ground, and severely and permanently injured, his buggy and harness broken, injured, and damaged, and his horse hurt, damaged, and permanently deteriorated in value. The count, by apt averments, sets out the personal injury to appellee, his expense in being cured, and loss of time, and also the damage to his horse, buggy, and harness, and seeks recovery of damage to his person and property. To this declaration the appellant filed the general issue. A trial resulted in a verdict and judgment thereon for appellee of \$1,000. On appeal to the appellate court, the judgment was affirmed; and the railway company prosecutes this further appeal. All controverted questions of fact necessary to sustain the judgment are necessarily determined against appellant by the judgment of the appellate court.

It is insisted that the trial court erred both in giving instructions and in the admission of evidence. The criticism of the second instruction given on behalf of appellee is that the jury were thereby instructed that, if they found for the plaintiff, then, in assessing his damages, they should take into consideration any damage shown to have resulted to the person of the plaintiff, and also to his personal property; the point made being that the damages to the person of the plaintiff, and the damages to his horse, buggy, and harness, were separate and distinct injuries, and hence could not be recovered for under a single count declaring for both. We are referred to *Brunsdon v. Humphrey*, L. R. 14 Q. B. Div. 141, as sustaining that view. The case, when properly considered, if it be accepted as a true exposition of the law, is not controlling. In that case the plaintiff recovered judgment for an injury to his cab caused by a collision with defendant's van, through the negligence of defendant's servants, and subsequently sued the same defendant for personal injury to himself alleged to have resulted from the same collision; and it was held that the former suit

Damages to
person and
property—
Misjoinder.

was not a bar to the second recovery. It is conceded, as indeed it must be, that recovery for damages to the person and to the property of appellee might be had in the same action, if declared for in separate counts of the declaration. The general rule of the common law is that where several causes of action of the same nature, that is, which require at the common law the same judgment, and are recoverable in the same form of action, exist between the same parties, in the same right, they may all be joined, by several counts, in one declaration. Gould, Pl. chap. 4, §§ 79, 85, 103; Chit. Pl. 228. And this would be so notwithstanding they might be so far several and distinct rights of action that a judgment for one would be no bar to a recovery for the other. And, if it be conceded that the injury to the person and to the property of appellee so far constituted distinct causes of action that separate suits might be maintained therefor, we are unable to perceive any reason, where the damages result in the same manner, and from the same negligent or willful act of the defendant, and are coincident in time, and the cause of action accrues to the plaintiff in the same right, and against the defendant in the same character or capacity, they may not be joined in the same count of the declaration. *Godfrey v. Buckmaster*, 1 Scam. (Ill.), 447. At most it would be violative only of the rule in respect of duplicity in pleading, but which, in the state of pleadings here, it will be unnecessary to determine. The declaration counts upon the injury to both the person and property of the plaintiff. The damages alleged to have been sustained to each are alleged with equal particularity; and it can no more be said that the suit is to recover damages resulting from his personal injuries than that it is for the recovery of damages to his horse, buggy, and harness. A substantive right of recovery is by the declaration based upon the injury to each—to the injury to his property no less than to his person. Duplicity in a declaration consists in joining in one and the same counts different grounds of action, of different natures, or of the same nature, to enforce only a single right of recovery. Gould, Pl. chap. 4, § 99. It must be manifest that the declaration here considered does not fall within this definition of duplicity given by Mr. Gould. But, be this as it may, and conceding that it is faulty for duplicity, this is a fault in pleading only, because it tends to useless prolixity and confusion, and is therefore only a fault in form. *Id.* Ordinarily, this defect in pleading, being of form only, can be taken advantage of only by special demurrer for that cause. Chit. Pl. 228. The defendant, having filed the general issue, waived this formal defect, and tendered issue upon the material averments of the declaration. Therefore, if the plaintiff sustained

his declaration by proof, his right of recovery would be as complete as if the two causes of action had been stated in different counts. It follows that, as the plaintiff had, under his declaration, a right to recover both for injury to his person and to his property, the court committed no error in so instructing the jury. This seems to have been the view of the learned counsel for appellant at the trial, for no demurrer was filed, and the evidence in respect of the damages was admitted without objection; and we are of opinion they have no just cause of complaint in regard to this instruction.

It is also insisted that the court erred to the prejudice of appellants in modifying the eighth and ninth instructions.

**Instructions
as to defend-
ant's duty.**

The eighth, as drawn, told the jury "that the mere omission on the part of the defendant to perform any duty which it ought to perform is not sufficient to render the defendant liable." The court added thereto the words "unless such omission caused the injury complained of." As asked, it stated an abstract proposition, which, without proper qualification, might tend to mislead, and might very properly have been refused. The modification does not relieve it of the criticism. It is said, however, that the jury, from the instruction as modified, would be justified in finding the defendant liable, if the omission caused the injury, whether it had exercised ordinary care to prevent the same or not, and regardless of whether the plaintiff was in the exercise of due and proper care or not. Without pausing to discuss whether the instruction is susceptible of that construction, it is apparent that the jury could not have been led into that error. By the 2d instruction of appellee, and by the 2d, 3d, 5th, 6th, 7th, 10th, 11th, 12th, and 13th, the rule in respect of the care required of the plaintiff, and the negligence of the defendant, requisite to constitute a right of recovery, was fully and amply stated, and the doctrine of comparative negligence given to the jury. In view of the character of instructions given, and the fact of the case, the jury could not, as we think, have been misled.

The ninth instruction, as asked, if correct in other respects, was inapplicable to the facts, and the court did not err in refusing to give it. There was no question involved

**Right of
street car to
track.**

of the right of the railway company to the use of its tracks, or of the duty "of foot passengers, or those travelling by ordinary methods," to yield to the street car the right of its track. The instruction, if given, if it had any effect, would have misled the jury into the belief that the street car company were not bound to exercise due and proper care to prevent collision with others using the same street, which certainly is not the law. The ninth, as

given, can scarcely be regarded as a modification of the instruction asked. There is no similitude between them. But the giving of this instruction, whether it be considered a modification of the one asked or an instruction given by the court, did appellant no injury. It is as follows: "(9) The jury are instructed as a matter of law that a company legally operating a street railway is entitled to the track on meeting foot passengers or other vehicles, as against any person, carriage, etc., driven or being thereon, with a view to delay or embarrass the progress of the cars." Appellant had introduced in evidence an ordinance of the city giving the right to its tracks to appellant, as against any person, carriage, etc., put, driven, or being thereon, with a view to delay, hinder, or embarrass the progress of the cars, and fixing a penalty against any one who should willfully so obstruct, hinder, or delay such progress. In view of this ordinance, already before the jury, the instruction cannot be said to be erroneous or prejudicial to appellant.

Appellant produced as a witness the conductor of the car that collided with appellee's buggy, who testified: "I saw this accident that happened on Twelfth street, near Desplaines, to Dr. Ingraham. When I first saw the horse and buggy, they were going on the south track, in the same direction. Both of us were going west. The hind end of the buggy was about even with the horses, and we went on about fifty feet together; and all of a sudden the driver of the buggy pulled in ahead of the horses, so close that in the next second the cars struck the buggy, and the buggy turned over. I didn't have time to pull the bell, or anything else, because the notice was too short. * * * I was on the rear platform, and I saw the horse and buggy turn out of the track, and saw the whole business; and the driver put on the brake as quick as he could, and the car nearly stopped before it struck the buggy. * * * I know he [the car driver] could not have stopped it [the car] in time to have saved the buggy." On cross examination he repeated in detail the same thing, and was asked if, at the scene of the accident, just after it happened, he did not tell appellee that he was sorry; that there were so many people standing up in front that he could not see him, (appellee,)—which he substantially denied having said. As affecting his credibility, it was material and important that he should have been in position to see what he testified he did see; and the question was clearly proper. And, being inconsistent with his testimony, and material, and his attention having been specifically called to the time and place of making the alleged statement, it was competent to call witnesses, and show that he did make the

Impeaching
credibility of
conductor.

same which was, in effect at least, done. But it is said there is discrepancy between the question asked of the principal witness and the witness called to contradict him, in this: that he was asked if he did not tell appellee that he was sorry that there were so many people standing up in front that he could not see "him," (appellee,) while the interrogatory put to the impeaching witness was whether he (the conductor) did not tell appellee that he was sorry that he could not see the "accident," because there were people on the front platform of the car—and therefore the court erred in allowing the witness in rebuttal to answer. The contention is without merit. Both witnesses testified that there was conversation between the conductor and appellee at the time and place stated. Both, undoubtedly, refer to the same conversation; and if the witness saw the appellee, he must have seen the accident, and he could not have seen the accident without seeing appellee. Moreover, the rule must receive a reasonable construction; and, if there was objection to the question of the character indicated, it should have been specifically pointed out, so that the interrogatory might have been changed to suit the phraseology of the principal witness. This was not done. Finding no error, the judgment is affirmed.

HUNTER

v.

NEW YORK, ONTARIO & WESTERN R. CO.

(New York Court of Appeals, Second Division, December 3, 1889.)

Judicial Notice—Height of Human Beings.—The court will take judicial notice of the fact that a man could not strike his head against an obstruction 4 feet 7 inches above the place on which he was sitting, such an accident being only possible in the case of a person 9 feet high.

Master and Servant—Impossible Theory—New Trial.—Plaintiff, a brakeman, was injured while passing through a tunnel. The entrance of the tunnel was 20 feet in height. 200 feet from the entrance, a brick arch began which reduced the height of the tunnel to 15 feet 9 inches. Plaintiff testified that he went on top of a box car and sat down, and that was the last that he remembered. He was found upon the ground with a gash on his forehead, which it was claimed, he received by coming in contact with the arch. The car on which plaintiff was sitting was 11 feet 2 inches high from the rail to the foot board that the men walked on. *Held*, that as the plaintiff could not have been injured by striking the arch while he was sitting upon the car, a verdict in his favor must be reversed.

APPEAL from General Term of the Supreme Court, Second Department.

Action for personal injuries. The General Term affirmed a verdict for the plaintiff, and the defendant appeals.

William Van Amee for appellant

T. A. Read for respondent.

BROWN, J.—Assuming that the plaintiff was struck upon the head by the brick arch within the tunnel, and that he was, as a result of that blow thrown from the cars, and injured, I think there was ample evidence for the jury to determine that the defendant was guilty of neglect producing the accident, and that the plaintiff was free from carelessness contributing to it. The jury were warranted in finding that the only notice that the plaintiff had of the existence of the arch was that received from the tell tale. This was located about 200 feet west of the west entrance of the tunnel. It served as a warning of the approach to the tunnel, but it gave no notice of the obstruction within the tunnel. A person receiving its warning, and noticing the height of the tunnel, might naturally suppose that the height at the entrance would be maintained throughout its length; and, if the height was at any point reduced, that notice of that fact would be given. Relying, therefore, upon what would be apparent to his observation, he was exposed to a danger of which he had no notice or information. The defendant evidently perceived the weakness of this part of its case, and gave evidence of actual notice of the existence of the arch to plaintiff, but upon that question the verdict of the jury is in accord with the plaintiff's testimony. The plaintiff also testified that he was instructed to ride upon the top of the cars at places where it might be necessary to apply the brakes. He was approaching such a point on the road when the accident happened; and it was a fact for the jury to determine whether, in going upon the top of the car at the time he did, he was guilty of any negligence. Certainly, if he had a right to assume, as we think he had, in the absence of notice as to the existence of the arch, that there was room in the tunnel to maintain a standing position, he would not necessarily be careless in occupying such a position on the car near his post of duty.

Notice of obstruction in tunnel.

The difficult question in the case is to reconcile the plaintiff's theory of the accident with the evidence. It appears that the tunnel at the west entrance was 20 feet high.

Two hundred feet from the entrance the brick arch began, and continued for a distance of 85 feet. It reduced the height of the tunnel to 15 feet 9 inches, measured from the rail. The plaintiff testified that he left the engine and went on the top of a box car and sat down. His exact words

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are: "I was sitting down on the box car—on the head box car—where the brake was. I went out on the box car and sat down, and that is the last I remember." This car was identified and proven by a witness called by plaintiff to have been 11 feet 2 inches high from the rail to the foot board that the men walk on, in the center of the roof. There was, therefore, a space of 4 feet and 7 inches between the top of the car, where plaintiff was sitting, and the bottom of the arch. There was a cut or gash on plaintiff's forehead which, it is claimed, he received by coming in contact with the arch, so that his head, to have received a blow at that point, must have been at least 4 feet 8 inches above the foot board on the top of the car. The plaintiff's counsel, in his brief, has endeavored to show the space between the car and the arch to have been much less; but the measurements appear, without contradiction, to be those I have stated. The theory of the plaintiff's case was that he was rendered unconscious by a blow received on his head, from coming in contact with the arch, and that he was carried by the train to a point about 300 feet east of the east end of the arch, where he fell from the car, and was run over, and his foot crushed. That he might have been carried to the point where he was found is not improbable; but that he could have received a blow on the head from the arch while sitting upon the top of the car would appear to be physically impossible.

There was no evidence given on the trial as to the plaintiff's size or height, and the argument is now made that as the jury saw him, and could therefore judge of his size, it must be assumed that it was not impossible for his head to have reached as high as the arch; and the learned judge who presided at the trial appears to have submitted this question to the jury, saying: "If the plaintiff was sitting down, it is for you to say whether his head would reach to that height." The verdict of the jury rests upon an affirmative answer to this question; and we are now called upon to say whether we will accept that finding, and sustain the judgment, or whether we will take judicial notice of the height of the human body, and the measurements of its separate parts, and, so taking notice of those facts, reverse a judgment that is based upon a finding clearly contrary to the laws of nature. No exception was taken to the charge; but, by an exception to the denial of the motion to dismiss the complaint, made at the close of the plaintiff's case, and renewed at the close of the testimony, on the ground that the facts proven were insufficient to constitute a cause of action, the question is properly before this court.

Courts are not bound to take judicial notice of matters of

fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case. The rule that permits a court to do so is of practical value in the law of appeal, where the evidence is clearly insufficient to support the judgment. In such case, judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are generally known, and have been duly authenticated in repositories of facts, open to all; and especially so of facts of official, scientific, or historical character. Thus, it has been held that courts will take judicial notice of matters of public history, such as the existence of the late civil war, and the particular acts which led to it (*Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174; *Woods v. Wilder*, 43 N. Y. 164;) of the general course of business in a community, including the universal practice of the banks, (*Merchants' Nat. Bank v. Hall*, 83 N. Y. 338; *Yerkes Nat. Bank, Port Jervis*, 69 N. Y. 382-387;) that books of general record, giving descriptions and standing of all ships, known as "American Lloyds," "The Green Book," and "The Record Book," are referred to by business men for the purpose of ascertaining the condition, capacity, and value of ships (*Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56, 63), of the value of "pounds" in our money, and, in rendering judgment, convert them into dollars (*Johnston v. Hedden*, 2 Johns. Cas. 274;) of the expectation of human life (*Johnson v. Railroad Co.*, 6 Duer (N. Y.), 634;) of the course of seasons and husbandry, and the general course of agriculture, and that a crop, at a certain date, would not have matured (*Ross v. Boswell*, 60 Ind. 235; *Floyd v. Ricks*, 14 Ark. 286;) of the time of the rising and setting of the sun and moon (*Case v. Perew*, 46 Hun (N. Y.), 57;) and, generally, of those things which happen according to the ordinary course of nature—the course of time and the movements of the heavenly bodies, the coincidence of the days of the week with the days of the month, ordinary public fasts and festivals and legal weights and measures (1 Greenl. Ev. pt. 1, chap. 2 § 5.) And, to ascertain such well known facts, recourse is had to such documents and references as are worthy of our confidence.

Judicial notice of matters of fact—
Authorities.

Within this rule the court may take notice of the size and height of the human frame; and, doing so, we know that the plaintiff's head could not have reached to a height sufficient to come in contact with the arch. We know that the average height of man is less than 6 feet; that the average length of the body from the lower end of the spine to the top of the head is less than 36 inches; that this measurement varies but little in

Judicial notice of size and height of human frame.

adults; and that the chief difference in the height of men is in the length of their lower limbs. To assume, therefore, as we must, in order to sustain the judgment, that the top of the plaintiff's head, when in a sitting position, was 4 feet 7 inches above the board on which he was sitting, is to assume him to have been not only far above the average height of man, but of a height beyond that of which we have any authentic record. It has not been claimed by the respondent that the plaintiff was a man of extraordinary height, and, if he was, I think a fact so rare in the course of nature should be made apparent, in some way, on the record. It can be asserted, I think, without contradiction, that a man whose forehead would be 4 feet 7 inches above a seat upon which he was sitting would have a frame at least 9 feet high. History affords no authenticated instance of men attaining such height. Buffon, in his *Natural History*, records instances of men attaining extraordinary heights, but modern writers do not accept his statements. Pliny tells of an Arabian 9 feet high, but the story is not authenticated. In the article upon "Giants," in the *Encyclopedia Britannica*, it is stated that the tallest man whose stature has been authentically recorded was Frederick the Great's Scottish giant, who was 8 feet 3 inches tall. In the College of Surgeons, in London, there is a skeleton of an Irishman, who was named "Charles Bierne," which measured 8 feet. Such heights are of rare occurrence, and the height of 9 feet has probably never been attained by man. Suppose the proof had shown that upon approaching the entrance to the tunnel the plaintiff was standing up, and his body had been found between the entrance and the west end of the arch. Would it be assumed that his head had struck the roof of the tunnel, which would have been 8 feet 10 inches above the top of the car? In other words, would the court, to sustain the judgment, assume him to have been over 8 feet and 10 inches in height? Yet that assumption would call for no greater exercise of the imagination than to suppose his head to have reached the bottom of the arch when he was in a sitting posture. To assume either fact requires us to believe the plaintiff was nearly, if not fully, 9 feet in height.

I think, therefore, the court may take judicial notice of the fact that a man could not strike his head against an obstruction 4 feet and 7 inches above the place on which he was sitting; and, that being so, the negligence of the defendant was not established. In no other way or manner is it suggested that the defendant was negligent, except in the maintenance of the arch, and the failure to warn the plaintiff of its existence. Unless the plaintiff's injuries can, by a preponderance of evidence, be attributed to those causes, his case must fail. Un-

less the proof shows that he struck his head against the arch, the judgment can only be sustained on pure speculation. There are numerous ways in which the accident might have happened, but none other have any support in the testimony; and if the case is left in such a condition that it is just as possible the injury came from one cause as another the judgment must be reversed. *Taylor v Yonkers*, 105 N. Y. 202. It has been said that an appellate court will not take judicial notice of facts not proven on the trial, for the purpose of reversing a judgment. While all reasonable intendments should be indulged in to support a judgment, the court is not called upon to assume the existence of a fact which is contrary to the ordinary course of nature, solely because the party raising the question did not give oral testimony upon it at the trial. In a case like this, in which it is well known that it can be submitted to a jury with generally but one result, the judgment should not be upheld when it is apparent that the verdict is not supported by the evidence. Here the finding which must exist to support the judgment is so contrary to our general knowledge, and so far outside of common occurrence, that it may, in the absence of further proof, be regarded as contrary to nature, and hence untrue; and substantial justice will be done by reversing the judgment, and granting a new trial. Upon such trial, if the plaintiff was a giant in stature, or if, as claimed by the learned counsel for respondent, the space above the car was less than I have stated, such facts may be made clear. The judgment should be reversed, and a new trial granted, costs to abide event.

FOLLETT, C. J., and POTTER and PARKER, J.J., concur. BRADLEY and VANN, J.J., dissent. HAIGHT, J., not sitting.

BRADLEY and VANN, J.J., dissent, for the reason that the ground upon which Judge BROWN founds his conclusion was not specifically raised at the trial, and it does not necessarily appear that it might not have been obviated if it had been so raised there; and that, in such case, judicial notice of a fact upon which no evidence was given or point made on the trial should not be taken for the purpose of reversing a judgment.

WILLIAMS

v.

DELAWARE, LACKAWANNA & WESTERN R. CO.

(New York Court of Appeals, Second Division, December 10, 1889.)

Master and Servant—Injuries—Overhead Bridge—Servant's Knowledge.—In an action by a brakeman for damages sustained through being struck by an overhead bridge, the plaintiff's testimony showed that he knew of the bridge and its location; that for six or seven months while employed upon the road as a fireman he passed under it daily; that he also passed under it daily during a period of three weeks while employed as a brakeman; that the bridge was in sight when he turned his back to it to go to the rear of the train, and that while he was thus proceeding he was struck and injured. *Held*, that as his evidence showed that he must have known, had he exercised ordinary care and observation, that the bridge was not of sufficient height to permit a person to pass under it while standing upon the top of a box car, he was guilty of contributory negligence and that a nonsuit ought to have been granted.

APPEAL from General Term of the Supreme Court, Fourth Department.

Action for damages for personal injuries. The circuit court denied a motion by the defendant for a nonsuit, and judgment for the plaintiff having been rendered, it was affirmed by the general term. See 39 Hun (N. Y.), 430. The defendant thereupon appealed.

Francis Kernan for appellant

W. T. Dunmore for respondent.

HAIGHT, J.—This action was brought to recover damages for a personal injury. On the 8th of July, 1888, the plaintiff was engaged as a brakeman upon one of the defendant's trains, composed of freight cars, and one passenger coach, which was at the rear end of the train. At the time of the injury he was standing on top of one of the box cars composing the train, and, as the train passed under the Mitchell street bridge, in the village of Norwich, the back of his head struck against the bridge, inflicting the injury complained of. There was a side or branch track, parallel with the main track, passing through under the bridge where the accident occurred, which was entered from the main track at either end by means of switches. It was the custom of this train to run upon the side track, and stop, so as to allow the passenger train to pass. The plaintiff had gone upon the top of the train, so as to operate the brakes and hold the

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train in position after it had entered upon the branch track. He supposed that the engineer would enter the branch track at the first switch, and draw the train upon it, but, instead of doing so, as he neared the switch he reopened the throttle of the engine, putting on more steam, so as to run through, upon the main track, to the other end of the branch, and then back in upon it. The plaintiff, seeing the engineer do this, and divining his purpose, turned to go back, towards the coach, and was thus proceeding, with his back to the bridge, when he was struck by the bridge, and injured. The height of the bridge from the top of the rail was 16 feet 1½ inches. The height of the box cars was from 11 feet 2 inches to 11 feet 6 inches. The height of the plaintiff was 5 feet 7 inches. Some of the cars used upon the defendant's road were lower and some higher than those of the defendant.

The only question which we shall consider in this case is as to whether or not the plaintiff was guilty of contributory negligence; and this depends upon the question as to whether he knew, or ought to have known, that this bridge was low, and that he could not pass under it while standing upon the top of the box

**Plaintiff's
contributory
negligence.**

car. Upon this point, it appears from his own testimony that he first began work upon the defendant's road, in 1880, as a fireman on one of the engines, and for six or seven months had run over this road passing under the bridge daily. He had been laid off for a time, and had again entered the employ of the defendant as brakeman, and as such had run upon this train for upwards of three weeks when the accident occurred. His duty was that of middle brakeman, and he was required to be generally on top of the train, so as to hold the train if it was going on a down grade, or approaching a station, and to answer signals which should be received from the engineer. Upon his direct examination he testified that he did not know that the bridge was not of sufficient height to enable him to stand upon the top of a box car, and pass under it in safety; that he did not think he had ever stood on top of box cars and passed under the bridge; that he could not have done it. Upon his cross-examination he conceded that he knew of the bridge, and its location; that, as fireman, he passed under it daily, and could see it, and after he became a brakeman he passed under it daily; that he understood his place as a brakeman; that when they were approaching a village it was his duty to be on top of the train, so as to apply the brakes, if required; that this was one of the written rules of the company; that, as they were running south, through the village of Norwich, they were in sight of the bridge; that it was in the day-time, and the bridge was

in plain sight when he turned his back to it, to go to the rear of the train; that he was usually on top of the box cars when they passed under the bridge; that it was his place to be there. Upon the redirect examination he further testified that "I never knew of passing under the bridge on top of a box car, that is, to name the car or remember it. All I can say is that I have been on the train when it passed under it, going back and forth."

It is quite evident from his testimony that he had on numerous occasions passed under this bridge while on top of the train; and, if so, he must have known, had he exercised ordinary care and observation, that it was not of sufficient height to permit a person to pass under it while standing upon the top of a box car of the company. In this regard, we are unable to distinguish the case from that of *Gibson v. Erie R. Co.*, 63 N. Y. 449. In that case the plaintiff was struck by the projecting roof of the depot building. He was familiar with the locality, and knew of the roof. He had, however, never measured its exact height from the platform, or its distance from the top of the cars. His information upon the subject was derived from general observation. In this case the bridge crossing over the railroad was an open, visible, permanent structure, which the plaintiff daily observed while passing under it, in the employ of the defendant. True, he had never measured its height from the rails; but, having passed through, under the bridge, while on top of the cars, he must have known that it was not of sufficient height to permit him to stand while so passing. The rule is that a servant who enters upon employment from its nature hazardous assumes the usual risks and perils of the service, and of the open, visible structures known to him, or of which he must have known, had he exercised ordinary care and observation. *De Forest v. Jewett*, 88 N. Y. 264; *Appel v. New York, B. & P. R. Co.*, 111 N. Y. 550; *Haas v. Buffalo, N. Y., etc., R. Co.*, 40 Hun (N. Y.), 145. It does not appear that the plaintiff's attention was diverted by anything that would tend to relieve him from the imputation of contributory negligence on the occasion in question; and, inasmuch as such negligence appears from his own testimony, the exception to the refusal of the defendant's motion for a nonsuit was well taken. The judgment should be reversed, and a new trial granted; costs to abide the event.

BRADLEY, PARKER and BROWN, JJ., concur. POTTER and VANN, JJ., dissenting. FOLLETT, C. J., not sitting.

Injuries to Train Hands from Overhead Bridges—Obligation of Company in Construction.—The cases do not agree as to the obligation of railroad com-

panies to make overhead bridges of sufficient height to permit a brakeman or other employe on the top of the train to pass under it while standing erect. In *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, it was declared that such bridges should be built of sufficient height to allow brakemen to pass through and under them without danger to their personal safety; and in *Louisville & N. R. Co. v. Hall* (Ala.), 39 Am. & Eng. R. Cas. 298, it was declared that it is the duty of the railroad company, if reasonably practicable, to place the structure at such an elevation that trains can pass under it without injury to persons employed on them, but if the conformation of the ground is such as to render the elevation of the bridge impossible, or to cause inconvenience to the public in the use of the bridge, or greatly increase the expense to the railroad company, the bridge may be so constructed as to extend below the line of absolute safety. In the same case it was declared that the company could not under any circumstances construct a bridge so low that brakemen on the top of the train in the discharge of their duties, could not avoid danger by bending or stooping. In *Baylor v. Delaware, L. & W. R. Co.*, 40 N. J. L. 23, it was held that there is no legal obligation on the part of a railroad company to build bridges with an elevation so great that an employe standing upright on the top of a car would not be injured; whilst in *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291, the court declared the rule to be, that it was only incumbent on the company to build bridges of sufficient height to enable employes in the discharge of their duties to pass under them by the use of ordinary care and prudence.

But it has been held that a railroad company is not liable except the bridge be erected or maintained by it; *Louisville & N. R. Co. v. Hall* (Ala.), 39 Am. & Eng. R. Cas. 298; nor is it liable where the bridge is not within its control. *Gibson v. Midland R. Co.*, 2 Ont. Rep. 658.

Same—Risks Assumed by Train Hands.—Brakemen and other employes who enter the employment of the company with knowledge of the position and height of a bridge, assume the risk of injury therefrom as part of the dangers of the employment. *Owen v. New York Cent. R. Co.*, 1 Lans. (N. Y.), 108. And such risks are also assumed where the employe remains in the service of the company after he acquired knowledge, or ought to have acquired knowledge of its dangerous condition; and the courts are unanimous in holding that he will be charged with knowledge if he has been accustomed to pass beneath it so frequently that ordinary observation ought to have made him acquainted with the manner of its construction. *Goff's Adm'r v. Norfolk & W. R. Co.*, 36 Fed. Rep. 299; *Wells v. Burlington, C. R. & N. R. Co.*, (Iowa), 2 Am. & Eng. R. Cas. 243; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291; *Rains v. St. Louis, I. M. & S. R. Co.* (Mo.), 5 Am. & Eng. R. Cas. 610; *Pittsburgh & C. R. Co. v. Sentmeyer* (Pa.), 5 *Id.* 508; *Hooper v. Columbia & G. R. Co.* (S. Car.), 28 *Id.* 433; *Carbine's Adm'r v. Bennington & R. R. Co.* (Vt.), 38 *Id.* 45; *Clark's Adm'r v. Richmond & D. R. Co.* (Va.), 18 *Id.* 78. See also *Baylor v. Delaware, L. & W. R. Co.*, 40 N. J. L. 23. But where the employe has no knowledge of the nature and condition of the structure and his employer does not give him notice thereof, he does not assume the risk of accident from the bridge. *Louisville, N. A. & C. R. Co. v. Wright* (Ind.), 33 Am. & Eng. R. Cas. 370; s. c., 38 *Id.* 41; *Baltimore & O. R. Co. v. Rowan* (Ind.), 23 *Id.* 390. See also *St. Louis, F. S. & W. R. Co. v. Irwin*, 37 Kan. 701; *Altee v. South Carolina R. Co.*, 21 S. Car. 550. And when a brakeman is placed on a freight train running upon a road with which he is not familiar, notice must be given to him of the danger arising from the existence of low bridges, but the provisions of the statute requiring the bell to be rung and the whistle to be blown when approaching a crossing, are intended to protect persons using the crossing,

and impose no duty on the company to give signals for the purpose of warning employes that the train is approaching an overhead bridge. *Louisville & N. R. Co. v. Hall* (Ala.), 39 Am. & Eng. R. Cas. 298.

Same—Contributory Negligence of Employes.—In some cases, the decision of the court that the railroad company is not liable for injuries to employes who had knowledge of the dangerous character of the bridge, has been placed upon the ground that such employes must have been guilty of negligence contributing to their injuries. See *Stirk v. Central R. & B. Co.*, 79 Ga. 495; *Riley v. Connecticut Riv. R. Co.* (Mass.), 15 Am. & Eng. R. Cas. 181; *Brossman v. Lehigh Val. R. Co.*, 113 Pa. St. 491; *Stoneback v. Thomas Iron Co.* (Pa.), 2 Cent. Rep. 604; *Clark's Adm'r v. Richmond & D. R. Co.* (Va.), 18 Am. & Eng. R. Cas. 78. And this is especially the case when the employe has been specially warned when approaching the bridge. *Devitt v. Pacific R. Co.*, 50 Mo. 302.

Same—Notice to Company of Dangerous Condition of Bridge—Evidence.—Evidence that other persons were injured in the same manner as the plaintiff by the same bridge, tends to show notice to the company of the dangerous condition of the bridge, and is admissible. *Louisville, N. A. & C. R. Co. v. Wright* (Ind.), 33 Am. & Eng. R. Cas. 370. But testimony that a dead body was seen lying near the bridge is not admissible in the absence of evidence to show that such person had been killed by being carried against the bridge, or by being knocked from the top of a train. *Louisville & N. R. Co. v. Hall* (Ala.), 39 Am. & Eng. R. Cas. 298. Evidence of a competent expert as to the merits or demerits of whipping-straps as cautionary signals, and whether or not they were generally in use on roads regarded as well regulated, is admissible, but such witness cannot give his opinion as to the management of the particular railroad in question. *Louisville & N. R. Co. v. Hall* (Ala.), 39 Am. & Eng. R. Cas. 298. But compare *Hooper v. Columbia & G. R. Co.* (S. Car.), 28 Am. & Eng. R. Cas. 433. Evidence that bridges on other railroads are too low for brakemen standing on the top of ordinary box cars to pass under them in safety, is not admissible. *Louisville N. A. & C. R. Co., v. Wright* (Ind.), 33 Am. & Eng. R. Cas. 370.

Same—Exemplary Damages.—In the absence of evidence tending to prove gross, wanton or reckless negligence in the construction of the bridge, no exemplary damages are recoverable. *Louisville & N. R. Co. v. Hall* (Ala.), 39 Am. & Eng. R. Cas. 298.

Same—Liability When Bridge Constructed by Person Other than Railroad Company.—If a bridge over a railroad is built in a safe and substantial manner and at a height above the tracks sufficient at the time it was built to admit of free use of the road, the mere fact that the bridge became dangerous because higher cars were brought into use by the railroad company so that a brakeman required by his duties to be on the top of a car could not pass under the bridge without in some instances lying down, will not render those maintaining the bridge liable to damages for the death of a brakeman who was knocked from the car and killed, if they had no notice of the change in the height of the cars. *Stoneback v. Thomas Iron Co.* (Pa.), 2 Cent. Rep. 604.

GOODRICH

v.

NEW YORK CENTRAL & HUDSON RIVER R. CO.

(New York Court of Appeals, Second Division, October 22, 1889.)

Master and Servant—Inspection of Cars of Other Companies.—A railroad company is bound to inspect the cars of another company, used upon its road just as it would inspect its own cars, and it owes this duty as master, and is responsible for injuries to servants caused by such defects as would be discovered by ordinary inspection.

Same—Coupling—Defective Draw-Bar—Duty of Employer.—Where the bumper or draw-bar of a car belonging to another company is lower than it ought to be, in consequence of the staple or strap in which it plays being broken on one side, the master is responsible for an accident caused by failure to discover and remedy such defect, and he has not fulfilled his duty by furnishing for the use of his employes, crooked links which can be used in coupling together cars upon which the bumpers are of different heights.

Same—Coupling—Risks Assumed by Brakemen.—The danger of injury arising from the engineer backing the train upon a stationary car with force so great as to make the dead-woods meet, is a risk of employment assumed by a brakeman, but he did not assume any risk where the accident was caused by the defective bumper of the moving car, which hung lower than it ought, passing under the bumper of the stationary car, and thus permitting the dead-woods to come together.

Same—Coupling—Defective Draw-Bar—Contributory Negligence.—Where it appears that a brakeman only saw that the bumper of the moving car was lower than the bumper of a stationary car when they were four or five feet apart, and that he thought that the coupling could be made with the straight link in the draw-bar, the question whether he was guilty of contributory negligence in attempting to so make the coupling instead of obtaining and using a crooked link, is for the jury.

FOLLETT, C. J., and POTTER, J., dissent.

APPEAL from a judgment of the general term of the third judicial department, which affirmed a judgment entered upon an order at the circuit dismissing the plaintiff's complaint. This action was brought to recover damages for injuries received by the plaintiff, a brakeman in the employ of the defendant, while engaged in coupling cars. It appeared from the testimony that on the morning of the 17th of October, 1882, the plaintiff and other employes of the defendant were directed to go from Albany to Fishkill, and take charge of a circus train which was to come upon defendant's road from the New England road. The circus train reached Fishkill about three o'clock in the afternoon, and was switched upon a side track north of the depot. In the evening, between 7 and 8 o'clock, the plaintiff was directed by the conductor to

couple some of the cars of the circus train to some stationary cars further north on the same track, and this he proceeded to do. He stood on the east side of the track as the cars were moving north at a slow gait. It was dark, and plaintiff had a lantern. When the cars to be coupled were within a few feet of each other, he stepped between them for the purpose of inserting the link which was in the bumper or draw-head of the stationary car. When the cars were three or four feet apart, he discovered that the bumper of the moving car was lower than the bumper of the stationary car. He testified that he thought, by raising the link, it would enter the bumper of the stationary car. He took hold of the link with his left hand to raise it up, but found it would not enter the bumper of the stationary car. The bumper of the moving car passed under the bumper of the stationary car, and in attempting to withdraw his hand it was caught between the dead-woods and severely crushed. The dead-woods were about eight inches on each side of the bumpers. Their purpose was to prevent the cars coming together, and thus afford protection to a person standing between them. The bumper on the moving car was not broken, but hung lower than the one on the stationary car, and lower than it was intended to hang, for the reason that the staple or strap which surrounded it, and in which it played, was broken on one side. It is customary, in coupling cars of which the bumpers are of different heights, to use a crooked link, and such links are supplied by the company, and were in the caboose which plaintiff and his fellows took with them from Albany to Fishkill. The link in the bumper at the time of the accident was a straight one. After the accident a crooked link was used, and the coupling was made, and the car was thus used while on defendant's road. The bumpers are backed by strong springs, and it frequently happens that, when the cars meet with considerable force, the bumpers are pressed in upon the springs, and the dead-woods come together; but when the cars approach each other at a slow, or, as the witnesses, term it, "ordinary," speed, the bumpers receive the shock, and a space is left between the dead-woods of from two to eight inches. It further appeared that in making the coupling the plaintiff's hand would necessarily be between the dead-woods of the two cars. Plaintiff appeals.

Amasa J. Parker for appellant.

Hamilton Harris for respondent.

BROWN, J.—It was decided in *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462, 24 Am. & Eng. R. Cas. 421, that a railroad company is bound to inspect the cars of an-

other company used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection; that when cars come to it from another road which have defects, visible or discernible by ordinary examination, it must either remedy such defects, or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road, or furnished to its employes, for transportation. When so furnished, the employes whose duty it is to manage the trains have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer. The defect complained of in this case was obvious and discernible to the most ordinary inspection, and could have been easily remedied. It is argued by the defendant that it had fulfilled its duty when it had furnished for the use of its employes crooked links, which could be used in coupling together cars upon which the bumpers were of different heights. We do not think that in this case that fulfilled the measure of defendant's obligation. It could not be so held, unless it was the duty of the plaintiff to examine and inspect the cars to ascertain whether the coupling appliances were in proper condition. The duty of examination, like the duty of furnishing proper machinery and appliances, in the first instance rests upon the master. *Fuller v. Jewett*, 80 N. Y. 46; *Gottlieb v. New York, L. E. & W. R. Co.*, *supra*. And the degree of vigilance required from a railroad corporation in this respect is measured by the danger to be apprehended and avoided. *Ellis v. New York, L. E. & W. R. Co.*, 95 N. Y. 546, 17 Am. & Eng. R. Cas. 641; *Salters v. Delaware, etc., Can. Co.*, 3 Hun (N. Y.), 338. While, in the case of corporations, the performance of this duty must be committed to employes, there is no presumption that it rests upon any particular individual. It is not within the apparent scope of a brakeman's duty, and does not necessarily rest upon him. In the absence of all evidence upon the subject, we cannot, therefore, presume that the examination and inspection of the particular cars in question had been committed to the plaintiff; and, unless it had, he had a right to assume that the master's duty had been performed by those having it in charge, and that the coupling appliances upon the cars were adequate to the performance of his work without extraordinary risk or danger.

Inspection of cars.

Duty of employer.

It is further contended by defendant that the accident was one of the ordinary risks of plaintiff's employment, and was liable to happen in coupling any cars. Some evidence to which our attention is called, given by plaintiff on his cross-examination, standing alone, would give some color to this claim, but, read in connection with the other testimony, shows that it is only when the cars are propelled against each other with great force that the dead-woods are liable to come together, and thus endanger the brakeman making the coupling. The evidence is that when the moving cars are backed upon the stationary car at a slow rate of speed, or at a speed ordinarily used in making couplings, the bumpers or draw-heads will take the whole shock, and the dead-woods will not meet, but there will be a space between them of from two to eight inches. Doubtless, the danger of injury arising from the engineer's backing the train upon the stationary car with great force is a risk which the brakeman must assume, and for which the corporation would not be responsible; but that was not the risk to which the plaintiff was exposed. The evidence is that the train was backing up slowly, and at a rate of speed that would not have brought the dead-woods in contact if the bumper had been in order. Because the bumper of the moving car was defective, and hung lower than it should have done, it passed under the bumper of the stationary car, and permitted the dead-woods to come together. The defective bumper was thus shown to have been the proximate cause of the accident. It was literally the *causa causans*. Its immediate effect was to permit the dead-woods of the two cars to come together, and the plaintiff was from that cause exposed to a danger not within the ordinary risks of his employment. This result was traceable directly to the defendant's failure to provide the moving car with bumpers in good order; and, unless the proof showed (which it did not) that plaintiff himself was in some way responsible for that condition of the car, the negligence of the defendant was established.

The question as to the plaintiff's contributory negligence was, I think, one of fact for the jury. He testified that, when the cars were four or five feet apart, he saw that the bumper of the moving car was lower than the bumper of the stationary car. It does not appear that he observed that it would pass under the bumper of the stationary car, or that there was any danger that the dead-woods would come together. On the contrary, he appears to have thought that the coupling could be made with the straight link that was in the draw-head. He had a

Risks assumed
by brakemen
—Defective
draw-heads.

Plaintiff's
contributory
negligence.

right to assume that fact, and that the coupling appliances were in good order. It was only at the moment that the cars were about to collide that he discovered his error. The court cannot affirm that for such an error of judgment, induced, as it was, to some extent, by defendant's neglect, he is to be held to have been careless. Under such circumstances, when the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of the danger that confronts him. If he acts the part of a prudent man, willing to and intending to perform the duty to which he has been assigned, he has done all that the law demands of him: and whether he acted such a part under the circumstances of this case was for the jury to determine. The order of the general term should be reversed, and a new trial granted, with costs to abide event.

All concur, except FOLLETT, C. J., and POTTER, J., dissenting, and HAIGHT, J., not voting.

Master and Servant—Obligation of Employer to Inspect Cars of Other Companies.—See note, 33 Am. & Eng. R. Cas. 358; *Gottlieb v. New York, L. E. & W. R. Co.* (N. Y.), 24 *Id.* 421; *Keith v. New Haven & N. R. Co.* (Mass.), 23 *Id.* 421; note, 21 *Id.* 561; *Mackin v. Boston & A. R. Co.* (Mass.), 15 *Id.* 196. See also *Simms v. South Carolina R. Co.* (S. Car.), 31 *Id.* 199, note, 204.

Same—Responsibility of Employer for Defective Coupling Apparatus.—See *Reed v. Burlington, C. R. & N. R. Co.* (Iowa), 31 Am. & Eng. R. Cas. 190; *Tabler v. Hannibal & St. J. R. Co.* (Mo.), 31 *Id.* 185; *Atchison T. & S. F. R. Co. v. Wagner* (Kan.), 21 *Id.* 637, note, 642; *Houston & T. C. R. Co. v. Maddox* (Tex.), 21 *Id.* 625; *Lawless v. Connecticut Riv. R. Co.* (Mass.), 18 *Id.* 96; *Tierney v. Burlington, C. R. & N. R. Co.* (Minn.), 15 *Id.* 290; *Whitman v. Wisconsin & M. R. Co.* (Wis.), 12 *Id.* 214; *Skellenger v. Chicago & N. W. R. Co.* (Iowa), 12 *Id.* 206; *King v. Ohio & M. R. Co.* (C. C.), 8 *Id.* 119; *Smith v. Potter* (Mich.), 2 *Id.* 140; note, 1 *Id.* 107.

Defective Coupling Apparatus—Contributory Negligence of Brakeman.—The conductor of a train received an order to forward a "bad-order" car to the repair shops, and handed the order to plaintiff, the middle brakeman of his train, who went to the rear of the train to give a duplicate copy of the order to the rear brakeman. The rear brakeman and plaintiff walked down to the bad-order car, the rear brakeman getting a chain with which to chain it to the way car, the rear car of the train. When the way car was in position to have the bad-order car chained to it, plaintiff offered to help to fasten the chain to the king-bolt of the bad-order car. The draw-bar of the bad-order car was entirely gone, and this was apparent at the slightest glance. When the way car and the bad-order car came together, by reason of the absence of a draw-bar from the latter, the space between them was so small as to crush any person who might happen to be there. At another station while the train was being side-tracked, the bad-order car became detached. Plaintiff assisted in pushing it towards the train, when, noticing that the chain which had connected the way car to the bad-order car and which had been put on the dead-woods of the bad-order car, dropping towards the ground he stepped in front of the bad-order car to pick it up. He did not look to see how far distant the bad-order car was from the way car, and just as he rose with the chain in his hand, he was caught between the way car and the bad-order car. Plaintiff knew that there was some defect in the coupling apparatus, but did not know its exact nature. *Held,*

that as plaintiff by the exercise of care might have known the proximity of the cars and might have learned the danger to which he was exposed from the defective coupling apparatus, he was guilty of contributory negligence and could not recover. *Rebelsky v. Chicago & N. W. R. Co.*, Iowa Sup. Ct., Jan. 23, 1890. GIVEN, J., who delivered the opinion of the court, said:—"To enable the plaintiff to recover, he must show that the defendant was guilty of negligence in one or both of the respects charged in the petition; that the negligence charged, of which the defendant was guilty, was the proximate cause of his being injured to his damage; and that he was free from negligence contributing to such injury. 'If the facts are such that but one conclusion can reasonably be drawn from them, it is the province of the court to determine that conclusion. But, if different minds might reasonably reach different conclusions from them, the parties are entitled to have the question determined by the jury.' *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa 159, 22 Am. & Eng. Corp. Cas. 336, and cases therein cited. There being no counter or conflicting testimony, we are to take that introduced as true, and say whether different minds might reasonably reach different conclusions therefrom. That the defendant might haul its disabled car from where it was to the shops for repairs at a proper time, and in a proper manner, is not questioned; nor is it questioned but that it was proper to haul it in day time, and in a freight train. The draw-bar being out, a chain was used in attaching the bad-order car to the rear of the train. There is no testimony to show that it should have been attached elsewhere in the train, or that there is any better or safer appliance known for making couplings in such cases than a chain such as was used. There is nothing to show how the coupling was made, or that it could have been in any different way. The fact that the chain came loose indicates that the attachment was not perfect, but there is nothing to show that it could have been more so. The chain was used to meet an emergency; and, for aught that appears, it was the best known appliance, and was used in the best known way to meet that emergency. The defendant had notified the plaintiff that it was a bad-order car. He knew that a chain was used in attaching it, and consequently must have known that the usual appliance for coupling was out of order. The absence of the draw-bar was obvious, and, with his attention called to it, as it had been, by the order and the use of the chain, could not have escaped his notice when he went in to pick up the chain, if he had exercised the slightest care. Neither the engineer of this train, nor the man that was pushing the disabled car, had any reason to expect that the plaintiff was going between the cars when and as he did, and therefore had no reason to give signals that the train was to be stopped, or that the bad-order car was being pushed. The plaintiff knew the bad-order car was moving towards the train, and that the train might be stopped so they would come together. By the exercise of care he would have known that the train had stopped, and consequently the danger. The only reasonable conclusion that can be drawn from this testimony is that it does not even tend to show that the defendant was negligent in either of the respects charged, and fails to show that the plaintiff was free from negligence on his part."

KARRER

v.

DETROIT, GRAND HAVEN & MILWAUKEE R. CO.

(76 Mich. 400.)

Master and Servant—Coupling—Defective Draw-Bar—Contributory Negligence.—Plaintiff, an experienced head brakeman, was injured while attempting to couple a car. He testified that in making the coupling, he had just inserted a link in the draw-bar of the moving car, and as he turned he was close by the other car, and that he had no time to do anything but make the coupling as well as he could. He attempted to raise with his knee the draw-bar of the stationary car, which on account of its defective condition had fallen down, but it did not come up high enough, struck the lower part of the draw-bar on the moving car, slipped up and hurt his finger. It appeared from his testimony that he saw the defect in the draw-bar complained of the instant he looked at it, and that, if he had looked around before the cars came together, he could have stepped out from between them. A rule of the company required employees to satisfy themselves that machinery, tools, cars, etc., which they were required to use in the performance of their duties, were in safe working order. The plaintiff was not acting under the orders of any other person at the time of the injury. *Held*, that he was guilty of contributory negligence which barred a recovery.

ON exceptions from Circuit Court, Shiawassee County.

Action for personal injuries. The defendant excepts to a judgment for the plaintiff.

Matthew Bush, Jr., (*Lyon & Hackleman*, of counsel,) for plaintiff.

E. W. Meddagh for defendant.

CAMPBELL, J.—Plaintiff was an experienced head brakeman on a freight train on defendant's road. On February 1, 1887, his train arrived at Holly, late in the afternoon, Facts. where he was directed to take a car standing on a side track, and connect it with his train. The engine was moved to the side track, and backed, under his direction, and subject to his orders, so as to bring one of the cars near the one to be attached. He put a link in the draw-bar of the car in motion, and walked back with it towards the standing car. While attempting to make the coupling his fingers were crushed. He claims it was the fault of the defendant, because of a defective draw-bar in the standing car. The cause of grievance stated in the declaration is as follows: "The defect complained of consisted in that the draw-bar and its appliances had become so old and worn out by long use without

repairs that such draw-bar dropped, and hung down about six inches lower than where it would be if in a proper state of repair, and in its proper position. That such defect of said draw-bar and its appliances was obvious and manifest, and could have been readily seen by defendant had it taken the trouble to have such car properly inspected, which it had not, or had it used reasonable care and diligence in the premises. That, owing to the darkness and snow, plaintiff could not and did not see the condition of said draw-bar as he approached it, and did not realize its condition until he was injured as aforesaid. That the draw-bar of the other car—the one attached to the train, and which contained the coupling link taken hold of by plaintiff—was in good condition. That the cars to be coupled were of equal height, and the draw-bars to them, had they been in good condition, would have been upon a level with each other; but, owing to the bad and defective condition of the draw-bar and its appliances of the car the plaintiff was trying to couple to the train, the draw-bar of such car was much lower than that of the car to which it was to be attached, and when they came together the upper projecting edge of the defective draw-bar meeting the lower edge of the draw-bar to the other car, glanced upward and inward, catching and crushing plaintiff's fingers, as aforesaid," etc.

The case on the trial was peculiar in this: that every other witness testified that the draw-bar complained of was not down or defective; and several witnesses agree that plaintiff stated almost immediately after the accident that no one was to blame but himself, and that the trouble arose from his glove sticking to the link, and his foot slipping. But while a jury may have the power to disregard testimony which agrees and believe what is contradicted, the verdict in the present case is directly against the charge of the court, and is not creditable to an intelligent jury. We are more concerned, however, with whether any case was made out, and whether any should have been left to the jury. The plaintiff's testimony for himself was all that was put in by him. According to that he was head brakeman, and doing the switching for his train. While at the depot, he was told to hitch onto the car in question, which was on a side track, and which he says he never examined, and never saw before, or since, to his knowledge. He does not swear positively what kind of a car it was, but thinks it was a peddler car. "The order was to lift a car to take to Fenton; and, if that was the case, it would be what we call a 'local worker.' I wouldn't be positive as to that." When told to hitch on he was probably from 25 to 30 rods from the car. "I uncoupled the en-

gine, hung on to one car, and went to the west switch, to back into this side track where these cars were, with the moving train." He first coupled a lumber car to the engine, or to a car just back of it; the testimony being a little blind on this. This lumber car was the one which was to be coupled to the car designated on the side track, and when he had got the lumber car attached to the advance car, and was preparing to couple it to the one behind, the latter was distant from 10 feet to half a car's length, or about a rod. Whether he signaled the engineer to back before or after he discovered there was no link in the lumber car draw-bar, is also left in doubt, but another brakeman, named Kipp, handed him a link, which he proceeded to put in and fasten with a pin while the train was moving backward, as required by his signal, and he walking backward with it, having his lantern on his right arm, and using his left hand to do the coupling. He had just got the coupling-pin in place, and as he turned he was close by the other car, and, as he says, had no time to do anything but make the coupling as well as he could. He attempted, as he says, to raise the draw-bar with his knee, as he saw it had dropped down, but it did not come up high enough, and struck the lower part of the draw-bar on the lumber car, and slipped up, and hurt his fingers. It appears from his testimony that he saw the draw-bar complained of the instant he looked at it, and that, if he had looked round before the cars came together, he could have stepped out from between the cars. It would be difficult to conceive of anything more reckless than his conduct as he himself describes it. He was not acting under anybody else's orders as to the manner or time of coupling. The engineer was acting on plaintiff's signals, and only moved as he ordered him to. The company had given him this printed order for his guidance: "Special Notice. Every employe of this company is hereby warned that before exposing himself to, or his fellow employes to, danger, it will be his duty to examine the condition of all machinery, tools, cars, engines, or trucks that he is required to use in the performance of his duties, satisfying himself, so far as he reasonably can, that they are in safe working order. It is the right and duty of every employe to take sufficient time to make such examination, and to refuse to obey any order which exposes him or his fellow employes to danger. All cases of personal injury must be reported promptly to the superintendent, with all particulars that can be obtained." (Signed by the general manager, superintendent, and train manager.)

It was plaintiff's duty to examine into the coupling arrangements of both cars before he attempted to couple them, and,

as they were only a rod apart at most before he started the train back, and as he says the defect was visible at once to anyone looking, one or two seconds would have furnished all the time needed to satisfy himself, had he been acting under any one else's orders and not for himself, but, as he had personal direction of the engineer's movements, and could move when he pleased, the case, as he presents it, was an aggravated one of the grossest carelessness, for which he and no one else was responsible. The circumstances were more against him than in any of the similar cases in which we have held a plaintiff to the duty of examining his surroundings for himself. *Hathaway v. Michigan Cent. R. Co.*, 51 Mich. 253, 12 Am. & Eng. R. Cas. 249; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101; *Batterson v. Chicago & G. T. R. Co.*, 53 Mich. 125; *Goulin v. Canada Southern Bridge Co.*, 64 Mich. 190; *Brewer v. Flint & P. M. R. Co.*, 56 Mich. 620.

While, as already suggested, plaintiff's testimony as to the condition of the draw-bar is contradicted by all the other witnesses in the case who saw the car, and, among others, by the brakeman who made the coupling of the same car, yet we look for our present purpose solely to his statement of the facts, on which defendant was clearly entitled to have the case taken from the jury. The court practically told the jury that, if they found a state of facts which plaintiff himself had sworn to, he could not recover, and he was the only witness on his own behalf. Where there is conflicting testimony, and a plaintiff's case is made out, unless disbelieved, it is proper to let a jury decide the controversy; but they should not be allowed to give a plaintiff a verdict against his own admissions and his own case as he makes it out, with no other reliance. The judgment should be reversed, and a new trial granted, with costs of both courts to the defendant.

SHERWOOD, C. J., and CHAMPLIN and LONG, JJ., concurred.
MORSE, J., did not sit.

HUNGERFORD

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(Minnesota Supreme Court, October 2, 1889.)

Injuries to Employees—Coupling Passenger Locomotive to Freight Car—Risks Assumed.—Where a brakeman who is inexperienced, and who has only been accustomed to coupling engines having the draft-iron usually found upon freight engines, is ordered to couple a passenger engine having a "goose-neck" draft-iron, he does not assume the increased risk arising from coupling such engine to a freight car, and the railroad company is liable to him for injuries arising from exposing him to the unusual danger without warning.

APPEAL from District Court, Mower County.

Kingsley & Shepherd for appellant.

French & Wright, Lovely & Morgan, and Walter J. Trask respondent.

COLLINS, J.—The defendant herein moved for a new trial upon the sole ground that the verdict was not justified by the evidence. From an order refusing to grant the motion an appeal is taken.

In the fall of 1887 plaintiff was employed by the defendant for a few days as head brakeman upon one of its freight trains. Prior to this he was wholly without actual experience as a brakeman, although he had obtained some knowledge of the duties by observing others while they were engaged in that kind of work. After a few days' absence from the road, he was again employed for the same service, and a few minutes afterwards, while attempting his first coupling, lost the forefinger of his right hand. This action was brought to recover damages for the loss. The coupling which plaintiff endeavored to make was that between the locomotive and the train, which consisted of box-cars, provided with the common coupler or draft-iron, and a caboose, the latter in the rear. The locomotive had previously been fitted up for passenger train service, with a so-called "goose-neck" draft-iron. This goose-neck is a large casting, bolted upon the rear of the tender in place of the ordinary draft-iron, and its name suggests its form and shape. It projects above, and its face or end surface, which is 7 by 12 inches, is beyond or futher to the rear than is the face or end

Facts.

of the draft-iron usually found upon freight locomotives; so far, in fact, that, whenever a locomotive so equipped is brought up with but slight force for coupling to a freight car, the end of the neck passes over the iron upon the car and strikes the dead-wood always found just above it, thus inevitably crushing any susceptible object which may be between the end surface of the neck and the wood upon the car. The plaintiff rode upon the tender, evidently in close proximity to the coupling appliance of which he now complains, and in the middle pocket of which he saw a link, through two switches. As the locomotive backed down to the train he took a coupling-pin, walked to the car, closely followed by the locomotive, and, when it came back upon him, stood holding the pin above the draft-iron of the car, in the usual, proper, and ordinarily safe position for making the connection had a common iron been upon the tender, instead of the goose-neck. As it was, his manner turned out to be unsafe and dangerous, for the pin and part of his hand were caught between the end of the neck and the dead-wood, causing the injury for which he claims damages. It seems to be admitted that, had an engine of the customary pattern for the freight service been used, plaintiff would not have been injured, for he was attempting the task in the usual way; and it is also admitted that had he been instructed as to the proper manner of coupling, under such circumstances, or had he been accustomed to the goose-neck, in combination with the freight car, he would have changed the link from the tender to the car before they came together, or as the former approached, would have directed the link in the goose-neck into its place in the draft-iron upon the car, completing the coupling in either case by dropping the pin from above through an aperture in the neck. This style of draft-iron is of no value whatever upon a freight engine, is rarely found upon one, and where so used is manifestly much more dangerous than the iron with which such engines are commonly supplied. It was designed expressly for passenger trains, to be used in connection with the Miller coupler and buffer universally found in the passenger service of the present day. A locomotive with such a draft-iron can be readily coupled from the platform of the baggage car or passenger coach, and, when in place upon the train, the end surface of the neck rests snugly against the buffer of the car. Its office is to take up the slack or play between the locomotive and the car, to prevent jerking, and thus, in connection with the before mentioned coupler and buffer, to make what is known in railway parlance as a "solid train."

The rules of law by which this case must be governed have

so often been declared by this court that they need not be repeated at length on this occasion. The plaintiff when entering into defendant's service as a brakeman on one of its freight trains, took upon himself only those risks which were naturally and ordinarily incident to his employment, or which from the facts before him, it was his duty to infer, and such risks, also, as might be announced to him as occasion required, and which he thereafter assumed. If defective instrumentalities were furnished for his use, he must not only have known or ought to have known their actual character and condition, but to have understood, or by the exercise of ordinary observation to have realized, the risks to which he was exposed by their use.

Risks assumed by brakeman.

This has been quite recently stated in *Russell v. Minneapolis & St. L. R. Co.*, 32 Minn. 230, a case wherein the injury resulted from the use of a freight engine with the customary draw-bar upon a baggage car furnished as is usual with the Miller coupler and buffer. There the combination was a freight engine and a car equipped for passenger trains; here it was a passenger engine and a freight car built for that use only. There the damage was caused because nothing was provided which would prevent the locomotive from coming dangerously near the car, should the ends of the draw-irons slip past each other, as they might do under certain circumstances, but not often; here it was caused by the absence of something which would prevent an appliance of no value upon a freight engine from continually being very dangerous to a brakeman who occupies the proper position for coupling a freight engine to a freight car, and for properly and with reasonable safety performing his duty; and plaintiff was confessedly in this position when injured. It may also be noticed that in the *Russell* case the plaintiff was a brakeman upon a train, part passenger and part freight, and had been using the couplers by which he was hurt for some time,—had become accustomed to them; while in this the plaintiff was a brakeman upon a freight only, and had never before been called upon to use a goose-neck draft-iron upon any kind of a train.

If, upon a comparison of facts in these cases, there is an advantage, it is with this plaintiff; but on the whole they are so much alike that a great deal of what is said in *re Russell* is pertinent and strictly applicable here. This plaintiff testified that he did not see the goose-neck on the locomotive until it was upon him. This testimony is characterized by appellant as incredible, because, as it claimed, the casting was large enough, and must have been observed when the plaintiff looked for and discovered the link in a pocket just

beneath the neck. We must assume the plaintiff's statement to be the fact, although it may seem strange that the iron escaped his attention. But it must be borne in mind that he was somewhat inexperienced, had worked about one week for defendant, was then laid off for a few days, and had only secured a place the morning of the accident, because another man had failed to report for duty. His mind was upon making a coupling precisely as he had made it before under like circumstances, and with the same instrumentalities. He had not been informed, nor had he learned by experience, that occasionally a passenger engine is put upon a freight train, and therefore may have not been in a condition to either notice or realize the situation that morning.

But, had he observed the goose neck, we are not prepared to say that this knowledge would have prevented a recovery in this action. By examining such an appendage when in its place in the train it will be seen that it passes over the iron of the car, and strikes the buffer above it. On reflection, one who had noticed this, and who knew something of the distance from the end of the iron upon a freight car and the dead wood above it, would realize the danger in holding the coupling pin in the usual way, and by a closer examination of the neck would discover that it is not solid, but has a large vertical aperture through which the pin may be dropped, as before mentioned, although the size of this aperture indicates that it is in part designed to lighten the casting. Even if he did inspect the appliance, it would not conclusively follow that by reason of such inspection, or the examination, which he perhaps ought to have given it, that he did or should have understood the risks to which he was exposed in attempting to make the coupling in the usual and prescribed way for brakemen on freight trains. It might not occur to him, although a man of ordinary prudence, that the defendant would expose him without warning to such a risk or would furnish a locomotive on which was a draft-iron notoriously unsafe when used by inexperienced men in connection with the common box car. And a person could easily ride upon the tender through the switches, as did plaintiff, without making the discovery that when the car was reached, and its coupling to the tender practicable, the end of the neck would of necessity have passed by and over the iron on the car. Nor would the examination which could be given as the neck approached the brakeman standing at his post, and about to make a coupling, clearly indicate to him that it projected so far as to be dangerous and unsafe. The master well knows from measurements, from actual and practical observation, and from the knowledge of the purpose for

Knowledge of
nature of
draft iron.

which these various instrumentalities are designed, just when and how they may be used with a reasonable degree of safety to his servants. But he must not expect them to have this same knowledge without some opportunity for acquiring it. This case is not distinguishable from *Russell v. Railway Co.*, *supra*. Order affirmed.

Coupling—Use of Locomotive Having "Goose-neck" Draft Iron—Notice to Employee.—Plaintiff, who was a brakeman on freight trains belonging to the defendant, had been so employed for six or seven months, when he was injured while coupling a box car to a locomotive. The locomotive was intended for a passenger train and had a coupling apparatus with an attachment commonly called "a goose-neck," which when used on freight trains was useless and very dangerous to the employe in the act of coupling. Plaintiff testified that he had never before seen one of these appliances on defendant's freight train locomotives; was not informed and did not know that they were in use; and while he was in the service had always worked with the ordinary locomotive furnished with the simple draw-head coupling apparatus. He also testified that the engine was sent out of the round-house without warning, and that he, not knowing or expecting that it had a goose-neck attachment, undertook to couple it to a box car in the usual way, and so was injured. *Held*, that the defendant was negligent in using the engine without warning plaintiff of the increased danger arising from the goose-neck attachment, and that a verdict for the plaintiff would not be set aside. *Galveston, H. & S. A. R. Co. v. Garrett*, Tex. Sup. Ct., March 12, 1889. COLLARD, J., said:—"There is evidence tending to show that defendant was negligent in using the McQueen engines in its train service, and in doing so without warning plaintiff of the increased hazard of his employment it violated its implied obligation to him. He was warranted in acting under the assumption that the machinery was safe, and was adapted to the service in which it and he were employed. He had the right to expect that the machinery was safe and suitable. He assumed the risks ordinarily incident to such employment, and such other only as he knew existed, or might have known by ordinary care. *Galveston, H. & H. R. Co. v. Drew*, 59 Tex. 10. Plaintiff's evidence shows that there was unusual risk, not common in such employment; that he was not warned of it,—did not know it; and that he had been working the whole time of his employment with the ordinary train engine,—from which the jury may have concluded that he was not chargeable with knowledge of the defect, or the want of the exercise of ordinary care. It was also clear that plaintiff did know of the dangerous character of these engines. All these questions were submitted to the jury by clear and appropriate charges, the law of the case, and verdict was for plaintiff, and we do not think it ought to be set aside. There were more witnesses against than for plaintiff's case on the vital point of his knowledge of the defect in the coupling apparatus, and there was a serious conflict in the evidence as to plaintiff's opportunities and means of information, by which it was attempted to show on defendant's side that plaintiff had constructive notice of the condition of the engine, that he ought to have known it, and could have done so by the exercise of reasonable care; but the jury solved all these conflicts in favor of plaintiff, accepting his testimony, and rejecting that of defendant."

Coupling—Unusual Construction of Apparatus—Ignorance of Brakeman.—Plaintiff, who had been employed as a brakeman for about three weeks, was familiar with the construction of the cars belonging to, and in general use by the defendants and other companies, but had never seen cars con-

structed in the same way as those of a circus train which he was engaged in coupling at the time of the accident. The cars of that train had dead-woods or buffer blocks on each side of the draw-heads. These buffer blocks prevented the coupling being made in the usual way, and required the brakeman to hold the pin with one hand above the blocks, and to guide the link below the blocks in making the couplings. In attempting to couple these cars, plaintiff's hand and wrist were caught between the buffer blocks and crushed. He was not informed of the peculiar construction of the circus car, nor warned of the extra danger thereof, and he testified that he stepped between the cars and attempted to make the coupling in the usual way without knowing of the existence of the buffer blocks, which he did not notice until he received the injury. *Held*, that the defendant should have notified the plaintiff of the unusual construction of the cars and warned him of the danger therefrom, and that he was entitled to recover. *Missouri Pac. R. Co. v. White*, Tex. Sup. Ct., Jan. 28, 1890. *ACKER, P. J.*, who delivered the opinion of the court, said:—"The only proposition submitted under the first assignment of error is: 'That a servant is presumed to have assumed all the risks ordinarily incident to the business or employment in which he engages; also, all other open and visible risks, whether usually incident to the business or not.' In the case of *Missouri, Pac. R. Co. v. Callbreath*, 66 Tex. 528, a case very similar in every particular to this, it was said: 'As a general principle, the law is well established that one who accepts the employment of another assumes all ordinary risks incident to such employment, and cannot recover for injuries resulting therefrom. * * * And as a general rule it is not the duty of the employer to instruct him as to the rules of service, or warn him of the dangers incident thereto, unless information be asked. *Missouri, Pac. R. Co. v. Watts*, 64 Tex. 568. But this rule is subject to some qualifications. It was held by this court, in the case last cited, that, the servant being inexperienced, and ignorant of the dangers of the service upon which he was just entering, it was the duty of the company to have informed him of these dangers. The law is thus stated by a well-known text-writer: 'Where there are * * * hazards incident to an occupation which the master knows, or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies, even where the danger or hazard is patent, if, through youth, inexperience, or other cause, the servant is incompetent to fully understand the nature and extent of the hazard.' *Wood, Mast. & Serv.* 714. * * * In the case before us it appears that the car which caused the injury was used only in connection with a patented invention, and only upon the lines of two railroad companies, so far as the evidence discloses, and that the proportion of these cars to those of the usual and regular construction was not more than one in a thousand. It further appears that appellee, though of long experience as a brakeman, had never seen a car like the one in question, and never saw the peculiarity of this until the injury was inflicted. All other cars were capable of being safely coupled by the 'helper' standing between them, and this was the usual mode of making the coupling. Under these circumstances, can it be said that appellee's experience availed him in avoiding the danger in this case? * * * We think, therefore, it was the duty of appellants to have informed appellee of the use of these construction cars upon their roads when he entered their service upon the yards, and of the danger of attempting to couple them in the usual way, and that their failure to do so was negligence, and renders them liable for the injury.

"The analogy between the case from which the foregoing lengthy quotation is made, and this case, is so striking that but little is left for us to say in disposing of the question presented by the first assignment of error.

Callbreath was an experienced brakeman, having been engaged in that service for years on different roads, and consequently familiar with the construction of cars in ordinary and general use upon railroads, but had never seen such a car as caused his injury until at the time his injuries were received. In this case, while White had had very little experience as a brakeman, he had become accustomed to the construction of the cars in the service of defendants, and which were in general use by railroads, and could couple and uncouple them with safety. The cars which caused his injury were of peculiar, unusual, and extrahazardous construction, with which he was entirely unacquainted, never having seen such before, or noticed these, until at the time of the accident; and we think the companies should have notified him of their unusual construction, and warned him of the danger therefrom. The conductor testified, it is true, that he notified the plaintiff of the unusual construction of the circus cars, and warned him to be careful; but this was contradicted by plaintiff, which made a question peculiarly within the province of the jury. It appears from the evidence that the construction of the circus cars made them extrahazardous; and it was the duty of the defendants to know that they were so, and to warn the plaintiff of the increased danger he was subjected to in handling them."

Same—Admissibility of Evidence.—The testimony of a witness that the death of plaintiff's husband was caused by a Miller draw-head passing the central draw-head and crushing him, there not being more than the space of four or five inches between the cars where he was standing, after the passing of the draw-heads is not open to the objection that it was a supposition and surmise on the part of the witness and hearsay. *Missouri Pac. R. Co. v. Lamothe*, Tex. Sup. Ct., Feb. 14, 1890.

JOHNSON

v.

STATE.

(*Alabama Supreme Court, January 27, 1890.*)

Corporate Privileges—Exemption of Employes from Military Duty.—The exemption of the servants of a railroad company from military duty, service on juries, and working on public roads, contained in a charter, is a right or privilege of the corporation, and not a mere personal privilege to officers, agents and servants of the company.

Same—Construction of Charter.—Where a charter granted by the state of Alabama provides that the company "shall have and enjoy all the rights, powers and privileges granted" by the statutes of another state incorporating the company, and the latter statutes contain a provision exempting the employes of the company from military duty, service on juries, and road labor, the language employed by the Alabama statutes confers by necessary construction upon the employes of the company, exemption from military duty, etc., within the state.

Same—Adoption of Charter of another State—Constitutionality of Exemption.—Where the courts of the state granting the charter containing the exemption, have held that such exemption is unconstitutional, such decision can not be considered by the Alabama courts, in so far as it affects the exemption conferred, if it has not been put in evidence.

APPEAL from Circuit Court, Limestone County.

Humes, Walker & Sheffey for appellant.

W. L. Martin, Atty. Gen., for the State.

CLOPTON, J.—The first section of “An act to incorporate the Memphis & Charleston Railroad Company,” passed by the general assembly of Alabama in January, 1850, declares: “Said company shall have and enjoy all the rights, powers, and privileges granted to them by the acts of incorporation above mentioned, and shall be subject to all the liabilities and restrictions imposed by the same.” The acts above mentioned are recited in the preamble as an act passed by the state of Tennessee in February, 1846, and an act amending the same passed in February, 1848, “for the formation of a company under the name and style of the Memphis & Charleston Railroad Company for the purpose of establishing a communication by railroad between Memphis, Tennessee, and Charleston, South Carolina.” The thirty-fifth section of the act of February, 1846, provides: “The president, directors, clerks, agents, officers, and servants of said company shall be exempt from military duty except in cases of invasion or insurrection, and shall also be exempt from serving on juries and working on public roads.” Defendant, who was indicted for failing to work on a public road in the county of Limestone after legal notice, claims that the exemption from road duty was conferred on the company by the provisions of the Alabama act of incorporation conferring the rights and privileges granted by the Tennessee act of incorporation.

Notwithstanding military duty, serving on juries, and working on public roads are duties devolved by law upon the people as individuals, who alone are responsible for failure to perform them, we do not concur in the position insisted on, that the exemption from such duties is a mere personal privilege to the officers, agents, and servants of the company, and not a right or privilege of the corporation. In *Zimmer v. State*, 30 Ark. 677, the defendant claimed freedom from liability to work on public roads under a similar exemption contained in the charter of the company of which he was an employe and servant, and the same position now insisted on was taken. It is said: “The exemption claimed by the defendant is not a mere personal privilege; but it is a valuable right of the company, granted to it by the state, to save and protect it against such serious inconveniences and injuries as would necessarily happen were those upon whom it must depend for that vigilance, promptness, and dispatch indispensable in its business liable to be called

Corporate
privilege.

away to the performance of other duties." It is true that charters of corporations are to be construed strictly against the corporators, and that doubts as to the proper construction are to be solved in favor of the state, and, "where it is susceptible of two meanings,—the one restricting, and the other extending, the powers of the corporation,—that construction is to be adopted which works the least harm to the state." *The Binghamton Bridge*, 3 Wall. (U. S.), 51. But the construction should not be so strained as to defeat the legislative grants, if expressed in terms free from ambiguity, when construed in the light of the attendant circumstances, and the purpose of the parties. That the most eligible route for the road was through a portion of this state, and that great and lasting benefits would accrue to its inhabitants, are recited in the preamble of the act as forming the consideration of its enactment. The purpose was to confer powers, rights, and privileges co-extensive with those granted by the Tennessee act of incorporation; and the language employed is comprehensive enough to include, by necessary construction, each and every right, power, and privilege granted thereby.

Construction
of charter.

It is also contended that no right or privilege is conferred by the Alabama act which the legislature of Tennessee had not authority to grant under the constitution of that state, though it may be specially mentioned in the act; and we are referred to the case of *Neely v. State*, 4 Lea (Tenn.), 316, in which the supreme court of Tennessee held a special exemption, in a charter of incorporation, from service as jurors and road hands, in favor of the officers and employes of the company, to be unconstitutional. It may be that comity requires that we should accept as binding the decision of the court of last resort in our sister state as to the constitutionality of such exemptions; and, on the principle that a statute adjudged to be unconstitutional is to be regarded as having never at any time been possessed of any legal force, and as having never existed, that the exemption claimed was never granted. But the decision of the supreme court of Tennessee was not put in evidence, and for this reason cannot be considered by us.

Decision of
Tennessee
court.

Reversed and remanded.

SMITH

v.

HUMESTON & SHENANDOAH R. CO.

(Iowa Supreme Court, October 21, 1889.)

Master and Servant—Employees Engaged in Operation of Railroad—Laborer.—A laborer employed to remove snow and ice from a railroad track, who is required to travel on the train for the purpose of being conveyed to the next obstruction, performs service which exposes him to hazards peculiar to the business of using and operating a railroad, and although the injury took place while he was on board the train for the purpose of being transported and while the train was standing still, he is entitled to recover under the provisions of Iowa Code, § 1307, that railway companies shall be liable for damages sustained by employees in consequence of negligence, mismanagement or willful wrongs, when such wrongs are in any manner connected with the use and operation of the railroad.

APPEAL from District Court, Wayne County.

Action for damages for personal injuries. After the introduction of the evidence, the court directed the jury to return a verdict in favor of the defendant, and the plaintiff appeals.

T. M. Fee and *R. C. Paston* for appellant.

W. W. Morsman for appellee.

ROBINSON, J.—On the 3rd day of February, 1886, the plaintiff and others were employed by defendant to remove snow and ice from its track. On that day the men so employed left Humeston on a train of defendant, and worked westward, arriving at Weldon about midnight. When not actually engaged in shovelling, the men sat in a caboose attached to the train, and rode therein from point to point where their services were required. At Weldon a passenger and a freight train were met, and at about 1 o'clock in the morning of the 4th the freight train left Weldon, going east, followed by a train made up of two engines, the caboose, and a passenger, and perhaps other, cars. The shovellers rode in the caboose, and were compelled to shovel the freight train out of the snow once or twice before it reached Le Roy. It was a cold, dark night, and the snow was drifting. At a point about half a mile east of Le Roy, and between 3 and 4 o'clock in the morning, the train on which plaintiff rode was stopped at a bridge in such a manner that the front end of the caboose stood on the bridge, 20 feet or more above the level of the ground below. A water-closet

was located in the north-east corner of the caboose, and was partially filled with shovels and picks, so that it could not be used for the purpose for which it was designed without removing them. Just south of the water-closet was the east door of the caboose. The front of the engine to which the caboose was attached was to the west. When the train had been stopped about half an hour, the plaintiff, urged by a pressing necessity, sought to use the water closet, but finding that it was not in condition for use, and having no knowledge that the caboose was on a bridge, opened the east door, and went upon the platform, for the purpose of relieving himself. The platform was covered with ice and snow to the depth of two or three inches, and was slippery. When plaintiff stepped upon the platform he was blinded for a moment by the head-light of the engine next to the caboose. He did not see the bridge. His feet slipped, and he fell to the ground below. The fall fractured the femur of his right leg in two places, and resulted in permanently disabling him. Defendant is charged with negligence in stopping the caboose on the bridge; in not notifying its occupants that it was stopped on a bridge; in permitting the tools to be placed in the water-closet; and in allowing ice and snow to accumulate on the east platform. The answer is a general denial.

Appellant contends that defendant is liable in this action by reason of the facts we have stated, under that section of the code which reads as follows: "Sec. 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

Employees engaged in operation of railroad.

It has been repeatedly held by this court that the employees who are entitled to the benefit of that section are those who are engaged in the business of operating railroads. *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 52; *Malone v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 417, 17 Am. & Eng. R. Cas. 644, and case therein cited; *Luce v. Chicago, St. P., M. & O. R. Co.*, 67 Iowa, 75; *Smith v. Burlington, C. R. & N. R. Co.*, 59 Iowa, 74, 6 Am. & Eng. R. Cas. 149; *Stroble v. Chicago, M. & St. P. R. Co.*, 70 Iowa, 559, 28 Am. & Eng. R. Cas. 510. It has also been

Authorities.

held that employes who are, by the nature of their employment, exposed to the hazards incident to moving trains, are within the statute, even though they are not engaged in operating them. *Pyne v. Chicago, B. & O. R. Co.*, 54 Iowa, 225; *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 372; *Pierce v. Central Iowa R. Co.*, 73 Iowa, 142; *Nelson v. Chicago, M. & St. P. R. Co.*, 73 Iowa, 576. In *Foley v. Chicago, R. I. & P. R. Co.*, 64 Iowa, 644, it was held that the wrongs for which corporations operating railways were liable under section 1307 include the neglect of agents, and the mismanagement of engineers and other employes. That construction was followed in *Malone v. Burlington, C. R. & N. R. Co.*, *supra*, and may now be regarded as settled. The question we are required to determine is whether plaintiff has shown himself to be within the statute. In the *Foley* case attention was called to the fact that, with the exception of the *Deppe* Case, all the actions in which this court has determined that railway companies are liable in this class of cases are those where the injury was received by the movement of cars or engines on the track, but it was not held that there could be no recovery unless the injury complained of was so received. The statute authorizes a recovery by an employe for damages sustained in consequence of a wrong "in any manner connected with the use and operation of any railway" on or about which the person injured is employed. It has been held that employes who are injured in railway coal-houses, while hoisting coal, are not within the statute. *Stroble v. Chicago, M. & St. P. R. Co.*, 70 Iowa, 559, 28 Am. & Eng. R. Cas. 510; *Luce v. Chicago, St. P., M. & O. R. Co.*, 67 Iowa, 75. Also that an engine-wiper who received injuries in the line of his duty, while assisting in closing a door after the passage of an engine, was not. *Malone v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 417, 17 Am. & Eng. R. Cas. 644. Nor is an employe injured in a railway shop, while assisting others in moving a driving wheel, within the statute. *Potter v. Chicago, R. I. & P. R. Co.*, 46 Iowa, 400. The same is true of persons employed to load and unload cars, who are not required to ride upon trains. *Schroeder v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 344; *Smith v. Burlington, C. R. & N. R. Co.*, 59 Iowa, 74, 6 Am. & Eng. R. Cas. 149.

In the *Foley* Case the duties of the plaintiff required him to ride upon trains, but the injury of which he complained was not in any manner the result of or connected with the use and operation of a train. He was injured while helping to make repairs on a car which was standing on the repair track in the yards of the company. In this case plaintiff's duties required him to ride on the train, and at the time of

receiving the injury he was on the train in the discharge of the duties of his employment. The evidence as to negligence was such that the jury might have found that the injury was the result of negligence or mismanagement on the part of employes of defendant. The placing of tools in the water-closet, the stopping of the caboose on the bridge, the failure to notify the occupants of its position, and permitting ice and snow to accumulate on the platform, were matters connected with the use and operation of the train, and hence of the railway.

We do not think that the fact that the train was not in motion when plaintiff was injured ought to defeat his recovery. He would not have been hurt had he not been on the train in the discharge of his duties. The service of himself and others were required, in order that the train might be moved, and when the track was cleared of obstructions he was obliged to ride on the train. We think he was within the statute. We do not think our conclusion is in conflict with any question determined in any of the cases to which our attention has been called, while it finds support in *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 52; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375; and *Smith v. Burlington, C. R. & N. R. Co.*, 59 Iowa, 74, 6 Am. & Eng. R. Cas. 149. Much that was said in *Pyne v. Chicago, B. & Q. R. Co.*, *supra*, is in harmony with the views we now express. In that case it was said that the proper test in determining the question is, "does the duty of the employe require him to perform service which exposes him to hazard peculiar to the business of using and operating a railroad?" In this case plaintiff was performing service for the defendant when he was in the caboose to be conveyed to the next obstruction, as well as when he was actually engaged in shoveling ice and snow.

2. The conclusion we have reached renders a decision of other questions discussed by counsel unnecessary. For the error of the court in withdrawing the case from the jury its judgment is reversed.

Construction of Section 1307, Iowa Code, Imposing on Railroad Companies Liability for Negligence of their Employes.—See *Whalen v. Chicago, R. I. & P. R. Co.* (Iowa), 38 Am. & Eng. R. Cas. 141, note 146.

GOLTZ

v.

MILWAUKEE, LAKE SHORE & WESTERN R. CO.

(Wisconsin Supreme Court, January 7, 1890.)

Master and Servant—Defective Appliances—Knowledge—Assumption of Risk.—A painter employed in painting a ceiling and using for that purpose during a period of 11 days, iron hooks supplied by his employer in which there is an apparent defect, and the position of which he changes two or three times a day, by continuing to use such hooks, assumes the risk of accident from the defect, and has no cause of action against his employer.

APPEAL from Circuit Court, Outagamie County.

Action for damages for personal injuries. The defendant appeals from a judgment for the plaintiff.

Alfred L. Cary for appellant.

Gabe Bouck for respondent.

ORTON, J.—The facts pertinent to the question upon which this case must be decided are substantially as follows: In

Facts. October, 1887, the plaintiff and one Jacob Konrad were employed by the defendant company to paint the ceiling of one of the defendant's shops at Kaukauna, in this state, and worked together, in painting the ceiling, nearly all the time from and including the 17th day of October to the 9th day of November, the time of the accident, and had worked in said business, each, eleven days and a half. The defendant furnished them, as the means or appliances of their work, six large iron hooks, six or seven feet long, made of inch iron. The hooks at the upper end were large enough to go over the beams of the ceiling, and at the lower end were so made as to receive a plank edgewise, two inches thick. These hooks placed in proper distances, held each end of the plank, and on the plank the platform or staging was laid, on which the painters could safely stand to paint said ceiling. These hooks were made at the blacksmith shop of the company, of wrought iron. The position of the platform was frequently changed by the plaintiff and Konrad, in doing said work. At the time of the accident one of the two-inch planks, about fourteen feet long, was placed in one of the hooks at the outer end, and at the other end was supported by a bracket against the wall; and while they were standing

on the platform, doing their work, the hook broke and let the platform down, and they were both precipitated to the floor below, a distance of about twenty feet, and the plaintiff was seriously injured. The plaintiff and Konrad had handled these hooks and moved them two or three times daily. In the construction of this particular hook there was evidently left a flaw or crack, which caused it to break at that place. That flaw or crack was observable from the outside, and could have been easily seen by any person whose eyes were directed to that point, without the necessity of any close scrutiny or examination. The crack or flaw where the hook broke was on the back part of the joint, and observable from the outside of it. The plaintiff testified as follows: "We would change these stagings something like two or three times a day or more. Konrad and I did the moving. We would take the planks off, change the hooks, and put them back again. I assisted him in doing it. No one else helped us. I never examined these hooks to see if they were all right or not. I never paid any attention to the hooks, any more than I used them. I had them in my hands every day. I lifted them up on the beams." Konrad testified, on behalf of the plaintiff, as follows: "They showed me the hook right away, (after the accident,) and I looked at it. I just looked at the iron at the break. I did not take it in my hands and examine it. It was about a foot or two from me when I looked at it. This flaw that I saw was right in the inside of the iron. It looked to me as though it would show on the outside of the iron. I suppose, if a person examined it before it was broken, the flaw would show on the outside of the iron. I think the flaw would indicate itself, by looking at the hook on the outside." Mr. Daley, another witness for the plaintiff, testified that he examined the hook, but did not make a very careful examination of it. He said at the time, "That iron has a flaw in it." He testified: "That hook was in bad condition where the break was. I could not tell you exactly in which part of the crook, but I know in one corner there was a crack about half an inch in size. It would show on the outside of the hook." The witnesses for the defendant, and the most of them skilled workmen in iron, including the blacksmith who made the hooks, testified that there was no crack or flaw or defect that could have been seen on the outside of the hook that broke. There is this explanation that might be given of this contradictory testimony: It was incumbent upon the defendant to prove that there was no defect or flaw in this hook that was apparent or observable to the mechanic of the defendant who made it, or to other skilled employes of the company who used or ex-

amined it. On the other hand, the plaintiff must show the converse of this proposition. But the plaintiff, in doing so, must not go so far as to show a defect observable, as well to a person of ordinary prudence and observation as to the plaintiff who used it. If the defect was latent, or if there was no defect, the plaintiff could not recover. If the defect was patent, then the defendant's negligence is established. But if it was so patent as to be equally observable to ordinary persons, or the plaintiff, with no want of ordinary care, then the plaintiff's negligence is established, and he cannot recover. The learned counsel of the appellant, therefore, contends—*First*, that there was no defect; and, *secondly*, that, if there was one, it was so patent as to be negligence on the part of the plaintiff in not discovering it, or if he discovered it, in using the defective implement. This is the material issue in the case, and it is quite a narrow and concentrated one, and there is not much latitude either way.

The jury found, in answer to the first, second, third, and seventh questions, that the hook was in a defective condition when the defendant delivered it to the plaintiff, and **Findings.** when it broke, and that the plaintiff used it properly, and that neither he nor his assistant was guilty of any ordinary neglect in the use of the hook that contributed to the injury. The jury also found, as a natural sequence of these their findings, in answer to the fourth question, that the defendant did not use ordinary care and diligence in the selection of the iron for this hook, in making it or testing it, and keeping it in repair. This is a sufficient finding of the defendant's negligence, and that there was a patent or observable defect in the hook when made, and when delivered to the plaintiff for his use. But the jury also found, in answer to the fifth question, as follows: "Up to the time the hook was delivered to the plaintiff there was a defect in it that could be observed by the owner of the hook, or parties that used it, if they were exercising ordinary care in using or taking care of it."

Both parties moved for judgment on this special verdict, and judgment was rendered thereon in favor of the plaintiff.

The learned counsel of the appellant contends that the last above special finding of the jury was a sufficient finding that the plaintiff was guilty of a want of ordinary care that contributed to his injury, in not observing the defect in the hook, or in using it after his discovery of the defect, or that such is the legal effect of this finding. The learned counsel of the respondent contends that this finding refers only to the defendant, the owner of the hook, and to parties that used it for the defendant before

Effect of finding.

it was delivered to the plaintiff, and is a finding of the defendant's negligence. But the language is too broad and comprehensive for such a restrictive meaning. It may embrace the defendant, but it also embraces the plaintiff and all persons who used the hook. It is impossible to construe it otherwise. "Up to [or at the time] the hook was delivered to the plaintiff, there was a defect in it that could be observed by parties that used it, if they were exercising ordinary care in using it," (or while using it.) The defect, at that time, was such and had been such, as to be observable to the plaintiff, or any parties that used it, including the plaintiff, if he or they was or were exercising ordinary care in or while using it. The legal effect is inevitable that the defect was such that the plaintiff could have observed it, if he had exercised ordinary care while using it. If he had observed or discovered the defect, he was then negligent in continuing to use it. If he did not observe it, then he was negligent in not observing it. In either case, he was not exercising ordinary care, or he was guilty of a want of ordinary care. If he had exercised ordinary care, he would not have been injured by that defect. He would have avoided it. The jury in this finding found certain facts, the legal conclusion of which is that the plaintiff was guilty of a want of ordinary care which contributed to the injury. This precludes his recovery. We are satisfied that the jury so understood this finding. The court, after instructing the jury on the matter of the fourth finding, as relating wholly to the negligence of the defendant, they are instructed in relation to the fifth finding as follows: "In respect to the fifth question, the proof on the part of the plaintiff tends to prove that there was an appearance of a flaw in the iron, at the place where the hook broke, that should have been probably noticed by a careful observer, before the iron was broken." The jury must have understood this instruction as referring to the negligence of the plaintiff in not observing the defect. All the instruction that was necessary as to the negligence of the defendant in not observing the flaw was complete and fully disposed of in the matter of the preceding or fourth question. There was no other instruction, except the above, on the subject of the plaintiff's negligence, or his want of ordinary care in not observing the defect, which would preclude his recovery in the action, and there was no finding upon that subject, except in answer to the said fifth question. In answer to the seventh question, the jury found "that the plaintiff, or his assistant, was not guilty of any ordinary neglect in the use of the hook, at the time complained of, that contributed to the happening of the injury." That finding was restricted to the proper use

of the hook by the plaintiff and his assistant, and the court so instructed the jury, as follows: "If from a fair preponderance of the evidence you find that, while the plaintiff and his assistant were using the hook, they injured or weakened it or broke it, by their use of it, and that the final breaking of the hook was occasioned by their abuse or misuse of the hook, you will say 'Yes' to this question.

The testimony of the plaintiff and his witnesses, some of which is above stated, sustained this fifth finding of the jury

Plaintiff's evidence. of the plaintiff's negligence in not observing the flaw or crack in the hook, or, if observing it, in

using the hook or in taking the risk. The plaintiff assisted in changing the staging two or three times a day. The hooks were taken down and put back again. The plaintiff never examined the hooks to see whether they were all right, and never paid any attention to them, except using them. He had them in his hands every day, and lifted them up on the beams. His assistant, Konrad, was shown the broken hook right away after the accident, and he looked at it casually, or "just looked at it, at the breaks," as he testified. He did not take it in his hand or examine it. It was a foot or two from him when he looked at it. He saw the flaw, and described it, and its exact location on the outside of the iron, where it was broken. If a person examined it before it was broken, the flaw would show on the outside of the iron. It would indicate itself, by looking at the outside of the hook. Daley, another witness for the plaintiff examined the hook, but did not make a careful examination of it. He said at the time: "That iron has a flaw in it, and that hook is in bad condition where the break was." In one corner of the crook there was a crack a half inch in size. It would show on the outside. The defect was apparent and observable, and could be easily seen by any one looking at the crook, even from some distance away. It was patent and open to common and casual observation. The plaintiff handled the hooks, two or three times a day, for three weeks, and never looked to see whether they were all right or not. The danger to the plaintiff was very great from a defective hook in such a place and use, and yet he never looked to see whether they were in good condition. Looking at them once would have saved him from his fall. The defect was obvious and the plaintiff had the most ample means of knowing it. The law presumes that he did know it, because he ought to have known it. In such cases he is charged with knowledge. Whether he knew it or not is immaterial, if he was guilty of a want of ordinary care in not knowing it, or informing himself of it.

The principles of law applicable to these facts have been recently recognized by this court, as follows: In *Wedgwood v. Chicago & N. W. R. Co.*, 41 Wis. 478, it was held that where the defect in the implement or machinery used is an obvious one, knowledge of it would be presumed. In *Kelly v. Abbot*, 63 Wis. 307, it was held that, where the deceased had equal or superior means of knowledge of an obvious defect in the machinery which caused his death, the company is not liable, and that its liability in such a case depends, not upon its absolute duty to furnish safe and suitable appliances, but upon its knowledge of the defect, actual or presumed. In *Ballou v. Chicago & N. W. R. Co.*, 54 Wis. 257, 5 Am. & Eng. R. Cas. 480, the principle laid down in *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548, is approved, that "an employe cannot recover for an injury * * * from a defect in the machinery * * * unless the employer knew, or ought to have known, of the defect, and the employe did not know of it, or had not equal means of knowledge:" citing also, to the same principle, *Dorsey v. Phillips & C. Construction Co.*, 42 Wis. 583; *Flanagan v. Chicago & N. W. R. Co.*, 45 Wis. 98, 50 Wis. 462, 2 Am. & Eng. R. Cas. 150; *Clark v. St. Paul & S. C. R. Co.*, 28 Minn. 128, 2 Am. & Eng. R. Cas. 240; *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140. In the same case it is held, by the authority of a great many cases from other states, which are cited approvingly, that an "employe who has knowledge of the defects in machinery about which he is employed, or who might know them by the exercise of reasonable care, cannot maintain an action for injuries resulting therefrom, if he continues in the employment without objection." In *Behm v. Armour*, 58 Wis. 1, it is held that the plaintiff, in such a case, ought to negative any knowledge on his part, or reasonable means of knowledge, of the defect. See, also, *Naylor v. Chicago & N. W. R. Co.*, 53 Wis. 661, 5 Am. & Eng. R. Cas. 460; *Hobbs v. Stauer*, 62 Wis. 108, and many other cases cited in the appellant's brief.

The evidence above referred to, and the above facts, most clearly bring this case within these well-established principles of law, and warranted the jury in finding that, when the hook was delivered to the plaintiff, there was a defect in it that could be observed by parties that used it, if they were exercising ordinary care in using it or taking care of it. As said before, the legal conclusion is that the plaintiff's own negligence contributed to his injury. The jury properly found the defendant negligent in not knowing the defect from inspection. But the law presumes that the defendant did know of such an obvious

Authorities.

Assumption
of risk—
Knowledge.

defect and the company is chargeable with knowledge of it, or with negligence in not knowing it, which involves the same legal liability. And precisely so of the plaintiff, with reasonable means of knowledge of the defect, such as he most undoubtedly had. The defendant, at the close of the plaintiff's testimony, moved the court to grant a nonsuit, which the court refused. We are asked to decide this ruling erroneous. We are inclined to think that the court ought to have granted the motion. But we will not hold it a reversible error, because the case was fully tried, and the jury reached a similar conclusion in their fifth finding of fact, although the court rendered judgment for the plaintiff. The motion of the defendant for judgment on the verdict ought to have been granted. The judgment of the circuit court is reversed, and the cause remanded, with direction to render judgment for the defendant.

Risks Assumed by Using Appliances Apparently Defective.—See note, 38 Am. & Eng. R. Cas. 33; Philadelphia & R. R. Co. v. Hughes (Pa.), 33 *Id.* 348, note 354; Covey v. Hannibal & St. J. R. Co. (Mo.), 28 *Id.* 382; Atchison, T. & S. F. R. Co. v. Wagner (Kan.), 21 *Id.* 637; Powers v. New York, L. E. & W. R. Co. (N. Y.), 21 *Id.* 609, note 612; Sioux City & P. R. Co. v. Finlayson (Neb.), 18 *Id.* 68; East Tennessee, V. & G. R. Co. v. Duffield (Tenn.), 18 *Id.* 35, note 42; Kansas City, St. J. & C. B. R. Co. v. Flynn (Mo.), 18 *Id.* 23, note 35; O'Rourke v. Union Pac. R. Co. (C. C.), 18 *Id.* 19, note 22; Kitteringham v. Sioux City & P. R. Co. (Iowa), 18 *Id.* 14, note 19; Fraker v. St. Paul, M. & M. R. Co. (Minn.), 15 *Id.* 256; McQueen v. Central Branch U. P. R. Co. (Kan.), 15 *Id.* 226; Watson v. Houston & T. C. R. Co. (Tex.), 11 *Id.* 213; Houston & T. C. R. Co. v. Myers (Tex.), 8 *Id.* 114.

Knowledge of Defect—Contributory Negligence—Province of Jury.—The plaintiff, an employe of defendant, was engaged in turning an engine upon a turntable, with the assistance of another engine upon an adjoining track, a stick being placed between them which was held by the plaintiff. When the pressure was applied, the engine upon the table slid or ran off, and became fast in the curb. The stick broke, and plaintiff was injured between the engines as they were suddenly brought together. The evidence tended to show that the turntable was in bad order, and unsuitable for the use required, and that the manner of operating it by the aid of another engine was authorized by the defendant. *Held*, under the evidence in the case, that whether the defendant was guilty of negligence in respect to the condition and use of the turntable, and whether the plaintiff was chargeable with contributory negligence, were questions properly submitted to the jury. *Held*, also, upon the case made by the evidence, that it was open for the jury to find that the plaintiff did not know or appreciate the risk of the work upon which he was engaged, and that in the exercise of reasonable care he was not bound to understand or appreciate the same. McDonald v. Chicago, St. P., M. & O. Ry. Co., Minn. Sup. Ct., Oct. 2, 1889.

Same—Use of Defective Brake.—Plaintiff sued to recover damages for the death of a brakeman who was killed through defects in the brake which he was using. The defect could be easily seen on looking at the brake or attempting to handle it, but it did not appear that the plaintiff

had ever seen or used it prior to the accident. He had only two or three minutes in which to determine whether to use it, and at the time he was busily engaged in uncoupling cars, regulating their movement, etc. The evidence did not show directly that his death was caused by the defective brake, but it appeared from the testimony of one witness that he had one arm around the brake lever, and was pulling on the brake immediately before he fell. Other witnesses testified to seeing him standing on the car near the brake just before. *Held*, that the questions whether deceased knew of the defect in the brake and used it notwithstanding his knowledge, and whether his death was caused thereby, were for the jury. *Philadelphia & R. R. Co. v. Huber*, Pa. Sup. Ct., Oct. 7, 1889.

Appliances Furnished by Master—Use of Other Defective Appliances.—A workman without instructions, made a ladder for the purpose of ascending and descending from the roof of a house, out of defective lumber. He advised the plaintiff to use this ladder instead of one furnished by the employer. Plaintiff did so and sustained injuries for which he brought an action. *Held*, that under this state of facts plaintiff was not entitled to recover, and that a non-suit was properly granted. *Bolton v. Georgia Pac. R. Co.*, Ga. Sup. Ct., Nov. 11, 1889.

SMITH

v.

WINONA & ST. PETER R. Co.

(Minnesota Supreme Court, November 22, 1889.)

Master and Servant—Risks of Employment.—Rule reaffirmed that a servant assumes, not only the risks ordinarily incident to his occupation, but also such extraordinary risks as he may knowingly and voluntarily encounter.

Same—Dangerous Material near Track—Knowledge of Brakeman.—A person employed as a brakeman on a section of four miles of railroad, and notified that there were stone piles beside the road, and so near to it that a person on the side of a car passing them would be struck, is to be deemed to have assumed the risk from that cause, although the precise location of the danger was not stated to him.

APPEAL from District Court, Blue Earth County.

P. A. Foster and *Freeman & Pfau* for appellant.

Wilson & Bowers for respondent.

DICKINSON, J.—This action is prosecuted under the statute to recover for the death of the plaintiff's intestate, caused by the alleged negligence of the defendant. The plaintiff secured a verdict, but the court granted a new trial, assigning as one of the reasons therefor, in effect, that he did not consider that the verdict was justified by the evidence. From that order this appeal was taken.

A part of the defendant's line of railroad consists of a
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short section, extending from the depot in the city of Mankato, northeasterly, less than four miles, to a point **Facts.** on the main line called "Mankato Junction." About one mile out from the Mankato depot, on this short section of road, is a switch, and a spur or side track about 600 feet in length. This side track is in the vicinity of and near a stone quarry, called "Saulpaugh's Quarry," as appears both from the pleadings and evidence, and was used principally as a track where cars were left by the defendant to be loaded with stone and brick; and from thence the loaded cars were taken out by the defendant for transit over its road. The stone quarry itself was not in sight from this switch, it being some distance away, beyond or under a hill; but, at the time of the accident, over some two acres of the ground near the side track was scattered a good deal of stone, taken out from the quarries, and deposited there. There were also two piles of stone, which had been taken out of the Saulpaugh quarry, and piled on either side of the side track, nearly as high as a box car, and extending some 30 or 40 feet along the track; and so near to it that a man on the side of a car passing the stone piles would be brought into contact with them. One Brown was the conductor of the trains that run back and forth between Mankato and the junction. At 1 o'clock in the morning of the day of the accident, Brown employed the deceased, Smith, who had resided in Mankato for about a year, to work as a brakeman, in the night service, over this short section of road. The deceased professed to have been previously engaged in like service. Smith was to commence work at 6 o'clock in the evening of that day. Brown testified that when he employed Smith he warned him of the "bad places in the yard and stone quarries; * * * told him about the elevator,—that it wouldn't clear him on the top of a box car; and I told him to look out for the chute at the stock pen, and that there were stone piles in the quarries that wouldn't clear him, at the Saulpaugh and at the Craig quarries." Again, as Brown testified, when Smith came to enter upon his service, at 6 o'clock that night, he went with him about the yard, (depot grounds,) showing him the dangerous places there, and told him that the stone piles would not clear him, and that he should not go on the side of a car while going past them. Upon this point there was no opposing evidence. We see no reason to suppose that these piles of stone were, or that they were understood to be, merely temporary obstructions. Smith, entering upon his service that evening, went out to the junction with a passenger train, and returned to Mankato. The same crew then went out with a train of freight cars, beyond the switch

track, and, on the way back to Mankato with a train of freight cars, the train was stopped, before reaching the switch, for the purpose of taking a car loaded with brick from the side track, and of setting an empty car in on the same track. Brown had directed Smith to go to the rear of the train, and that he (Brown) and another brakeman (Erickson) would get out the car of brick at the switch, and set an empty car in there. The engine being detached from the train, went in on the side track with an empty car, and coupled on the car loaded with brick. As the engine was going out with these two cars from the side track to the main track, Smith, without being directed so to do, came across from the train of cars standing on the main track, and was climbing up a side ladder on one of the two cars, then moving about four or five miles an hour, when, in passing one of the stone piles, he was swept off, and instantly killed. This was after 9 o'clock at night. A strong case of negligence on the part of the defendant is here presented, and it was not for insufficiency of proof of that fact that a new trial was allowed. It is probable that the insufficiency of the evidence upon which the granting of a new trial was based was with respect to the point as to whether deceased had not been so warned of this danger when he was employed for this service that he must be deemed to have voluntarily assumed the risk. We might rest our decision affirming the order of the court below upon the rule laid down in *Hicks v. Stone*, 13 Minn. 434, (Gil. 398,) deciding, as we do, that the evidence does not so clearly and palpably support the verdict that the order of the trial court should be reversed; but, in view of another trial, it is expedient that we express our opinion somewhat further upon this feature of the case.

It is contended on the part of the plaintiff that the notice of the danger from the stone piles was insufficient to cast upon the servant the extraordinary risk from that cause, for the reason that Brown referred to the stone piles as being at Saulpaugh's quarry, when in fact, as it is claimed, they were not at the quarry; and, further, because even the location of the quarry was not defined by Brown. It is too well settled by the decisions of this court, in accordance with the law as it has been generally declared, to be now questioned, that in general a servant assumes, not only the risks ordinarily incident to his occupation, but such extraordinary risks as he may knowingly and voluntarily encounter. *Fleming v. St. Paul & D. R. Co.*, 27 Minn. 111; *Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137; *Clark v. St. Paul & S. C. R. Co.*, 28 Minn. 128, 2 Am. & Eng. R. Cas. 240; *Greene v. Minneapolis & St. P. R. Co.*, 31 Minn.

Risks assumed by employee.

248, 15 Am. & Eng. R. Cas. 214; *Sherman v. Chicago, M. & St. P. R. Co.*, 34 Minn. 259; *Cook v. St. Paul, M. & M. R. Co.*, 34 Minn. 45; *Wilson v. Winona & St. P. R. Co.*, 37 Minn. 326, 31 Am. & Eng. R. Cas. 244. See, also, note and cases cited, 77 Am. Dec. 222.

The terms in which we have stated the general proposition suggest the distinction which has been recognized as to those who, from infancy or from other causes, may be incapable of appreciating a danger, of the existence of which they may be informed. Nor perhaps is it to be asserted without qualification that, if a servant unexpectedly encounters an extraordinary danger, not incident to his service, and of which he had not been apprised, but goes on with the discharge of his present duty in the face of such danger, that he does so at his peril; that he voluntarily assumes the risk. *Cooley, Torts*, 555. But no such exceptional conditions are presented in this case. If the testimony of Brown is to be believed, the deceased was notified at the time of his employment of the very danger which is the ground of this action. It is not clear from the evidence that Brown informed him so particularly as to the location of these stone piles that the deceased must be deemed to have known that they were located at this side track. It does not appear that the deceased knew where the Saulpaugh quarry was. But notice of the precise nature of this danger was involved in the warning which, according to Brown's testimony, was given to him. If such notice was given, he must have understood the nature and extent of the peril, and that this danger was one which he was likely to encounter as a brakeman on this line of less than four miles of road. Under such circumstances the deceased, even though he was not informed as to the precise location of the danger, must be regarded as having voluntarily assumed the risk. We see no way to avoid this conclusion consistently with the rule of law as to assumption of the risk of the known dangers of the service. Order affirmed.

Injuries to Employees—Erections and Obstructions Adjoining Track.—See *Scanlon v. Boston & A. R. Co. (Mass.)*, 38 Am. & Eng. R. Cas. 48, notes, 50, 175.

JOHNSON

v.

ST. PAUL, MINNEAPOLIS & MANITOBA R. CO.

(Minnesota Supreme Court, February 27, 1890.)

Master and Servant—Dangerous Erections Near Track—Notice.—It is the duty of a railway company to place its structures and signal posts at a reasonably safe distance from its tracks so as not to be dangerous to brakemen and other operatives upon the trains, or to warn them of such dangers, if they exist. The employees are not presumed to assume the risk of such perils, in the absence of notice.

Same—Negligence of Employer—Contributory Negligence.—Plaintiff's intestate, who had been employed for about two weeks in its yard, where were numerous tracks and constantly moving trains, was killed by coming in contact with a signal post while ascending the outside ladder of a box car. The post was four feet from the rail. There was evidence tending to show that the post was too near the cars to be practically safe for operatives, unless aware of the danger. *Held*, that upon the evidence, the question of defendant's negligence in locating and maintaining the post was for the jury (GILFILLAN, C. J., dissenting;) and also that the court was not warranted in holding, as a matter of law, that the deceased was guilty of contributory negligence in not observing that the post was so near the cars as to be dangerous, and in not appreciating and avoiding the danger. But the evidence is held not so clearly to preponderate in favor of the verdict as to warrant a reversal of the order of the trial court granting a new trial.

APPEAL from District Court, Ramsey County.

Richard K. Boney for appellant.

Flandrau, Squires & Cutcheon, (*M. D. Grover*, of counsel,) for respondent.

VANDEBURGH, J.—The general propositions of law applicable to this case are that a railroad company is bound to place signal posts or other structures used in connection with its road, or the operation thereof, at a reasonably safe distance from the track, so as not to be dangerous to brakemen or other employees who work on its trains; but if, for any reason, it is found necessary to erect or place such structures so close as to be hazardous to its employees, it is in such case its duty to warn them of the danger, so that they may understand the nature of the risks to which they are to be subjected, and may govern themselves accordingly; and, in the absence of such notice, they have a right to assume that the company has performed its duty in this respect. They are presumed to have knowledge of the ordinary perils of the employment, but not of special or extra hazards,

Erections
near railroad.

such as may arise from the unsafe proximity of signal posts, bridges, etc., of the presence of which they have not been informed, or of the dangers incident to which they have not learned. If, in case of an accident to an employe, the master's failure to perform his duty in these respects is clearly established—that is to say, if such structures are obviously so near the track as to be dangerous, or if, on the other hand, they are shown to be so far removed as to make it apparent that employes or operatives can discharge their duties in the exercise of ordinary prudence, with reasonable safety, or if it is clear that the plaintiff has negligently exposed himself to danger, or knew, or in the exercise of ordinary prudence ought to have known, and avoided it—in all such cases the question of negligence, or the exercise of reasonable care on the part of either or both parties, will be for the court; otherwise it will be for the jury. These propositions are so generally accepted that they hardly need to be referred to. The chief difficulty lies in their application to the facts of particular cases.

In the case at bar, plaintiff's intestate was employed as a switchman in defendant's yard at St. Paul, near the Union depot, where there is a great number of tracks, over
Facts. which numerous trains from different lines enter and depart from the depot. The defendant has constructed, and for several years has operated, at that place, a system of interlocking switches, worked in connection with semaphores or signal posts, of which there are 30 in its yard. The deceased, while discharging his duty, was in the act of climbing up or down the side ladder of a box car on a moving train, when it was drawn past one of these signal posts, which struck his body, and he was knocked down and killed. The post in question was 8 inches square, and situated between the tracks, which were distant from each other 14 feet from center to center, and was distant 4 feet each way from the rails. Allowing for the space occupied by the roof and ladder, the witnesses are not agreed as to the exact distance between the car and the post, but there is evidence in the case tending to prove that it was too close to moving trains to be safe for employes, unless they exercised care to avoid it while the trains were passing by it. There is also evidence tending to prove with reasonable certainty that it was necessary to maintain a signal post of some kind at or near that point, for the protection of moving trains, and in order to conduct the business safely and successfully. The location, size, proximity of the post to the cars, the character of the duties of the deceased, the nature and extent of defendant's business, are also shown by the evidence; and, from all the circumstances disclosed by it, we

think the question whether the defendant used reasonable care and diligence, within the rule stated as respects the safety of its employes, was for the jury.

There is no evidence that he was warned or notified of the peculiar hazard to which he might be exposed from the situation of the signal post. But he had been employed there for two weeks or more, and had occasion to pass by it many times a day, and it was an object so prominent and so essential in the service in which he was engaged that his attention must have been frequently drawn to it. We are not prepared to say, however, that this is conclusive evidence that he was negligent, or that he knew, or should have known, if he used ordinary prudence, the danger of such an accident. His labors were onerous, his duties were necessarily pressing and absorbing, while engaged in his employment; and, while he must have known of the existence and location of this post, he may not have known from mere observation, or unless his attention had in some way been specially called to it, (situated as it was, in the center, between the tracks,) that it was near enough to the cars to be dangerous, but might be misled unless he had made actual measurement or calculation. It may be observed, also, that his attention would more likely be called to the movable signal extending out from the post than to the post itself. In the absence of anything to excite special apprehension of danger from such cause, he might also assume that the defendant had exercised due care in the location of the post. *Whalen v. Illinois & St. L. R. Co.*, 16 Ill. App. 323, and cases. We do not, therefore, consider that the fact that he had worked in the yard for the time mentioned, notwithstanding he was bound to exercise care and diligence commensurate with the generally dangerous character of his business, was, as a matter of law, conclusive that he was negligent, nor do we undertake to say that he was not. But here was a variety of facts and circumstances to be considered and weighed, and the case was one which, in our judgment, was properly submitted to the jury. The trial court granted the motion for a new trial on the ground that the verdict was not justified by the evidence. Upon the state of the record this will not be held to be an abuse of its discretion, and, in conformity with the well established practice of this court in such cases, the order will not therefore be reversed, though the trial court went further, and was also of the opinion that the deceased was shown to be guilty of contributory negligence. Order affirmed.

GILFILLAN, C. J.—I concur in the result, but dissent from the proposition that the question of the negligence of the de-

ceased, or his assumption of the risks of the business, was for the jury.

GULF, COLORADO, & SANTA FE R. CO.

v.

REDEKER.

(*Texas Supreme Court, December 3, 1889.*)

Master and Servant—Employment of Minor without Parent's Consent.—When one knowingly engages a minor in a dangerous employment without the father's consent, and the minor is injured in such employment he is responsible to the father for any consequent loss of the son's services to him.

Same—Consent of Mother.—Where the parents of a minor are living together, the consent of the mother is not sufficient to relieve the employer from liability for the loss; the consent of the father must be obtained.

Same—Consent of Father to Engage in Railroad—Employment as Brakeman.—Although the father of a minor had given him a general permission to follow railroading for a living, and had consented to his employment by another company as fireman, the right of the father to recover for loss of services for injuries sustained by his son while employed without his actual consent as a brakeman, is not thereby affected.

Same—Employer's Knowledge of Minority—Notice by Parent.—If the employer had knowledge of the minority, it was his duty to ascertain whether the infant had a parent, and if so, to obtain the consent of the parent before making the employment, and the father was under no obligation, even where he had consented that his son should follow railroading for a living and that he might undertake work as a brakeman, to notify the employer that he could not consent to his employment as a brakeman.

Excessive Damages—When Remittitur May Be Entered.—Where the law furnishes fixed rules and principles to regulate the measure of damages by which it may be determined in how much the verdict is excessive, a *remittitur* of the excess may be received in answer to a motion for a new trial on the ground of excessive damages. Accordingly, where a verdict for loss of services shows the elements of damage and the rate of compensation therefor, a new trial will not be granted where a *remittitur* is made of the excess.

APPEAL from District Court, Tarrant County. Commissioner's decision.

Shepard & Miller for appellant.

Wm. McLaury and Ball & McCart for appellee.

COLLARD, J.—This action was brought by the appellee, Louis Redeker, for loss of services of his minor son, J. W. Redeker, expenses, etc., resulting from an injury received while the minor was engaged as an employe of the Gulf, Colorado & Santa Fe Railway Company, on a construction train, in the capacity of a brakeman.

On the former appeal of the case, the court, Mr. Justice GAINES delivering the opinion, laid down the following propositions of law. He said: "There can be no question that if the injury was the result of negligence, as alleged in the petition, the father was entitled to a judgment for damages for loss of service and incidental expenses accruing from the injury.

**Employment
of minor—
Liability for
loss of service.**

Houston, etc., R. Co. v. Miller, 49 Tex. 322. We are also of opinion that when one knowingly engages a minor in a dangerous employment, without the father's consent, and the minor is injured in such employment, he is responsible to the father for any consequent loss of the son's services to him.

* * * This is the rule when the minor is employed by another with the parent's consent, and, without such consent, is put by his employer at a more dangerous business, and thereby receives an injury, * * * and we see no reason why one less stringent should be applied in case the minor is knowingly engaged in a perilous occupation in the first instance, against the parent's will." 67 Tex. 191. The case was reversed and sent back for another trial on the ground that it did not appear from the testimony that defendant knew that the son was a minor, or that it ought to have been known from his appearance. On the last trial this evidence was supplied to this extent, that the fact was made known to the conductor before the injury,—the conductor who had employed him, under whom he served, and who had authority to employ and discharge such employes of the company. On this appeal other questions are at issue.

It was shown on the last trial that the father, plaintiff, was only occasionally at home; was employed as engineer on the same road running between his home at Ft. Worth and Temple; came into Ft. Worth in the evening, and would go right out again, laying over at Temple; stopped in Ft. Worth just about long enough to go home; came in sleepy, and would lie down. Under these circumstances, the father being absent, young Redeker, by his mother's permission, left home to get a position on a railroad, (had been idle about six weeks,) having been, by his father's consent, previously at work as a fireman on the "T. P." road, both parents having consented that he should follow railroading for a living; went to Houston, and was employed by defendant's agent as a wiper or watchman, and was in a few days put to work as a brakeman on a construction train. While employed as a watchman, he wrote his mother of the fact, but she did not know the character of his work had been changed. His father did not consent to his taking employment with defendant at all. He says he did not know where

Facts.

he was, or what he was doing, but his wife testified that when "he came home and found John had gone to Houston, into the railway service, he was not to say angry, but he did not like it." The defendant asked the court to charge the jury that, if the son went away from home, with his mother's consent, to enter into railway service, and no notice was given to defendant that he was not permitted to take employment as a brakeman, the plaintiff could not recover. The court refused to give the charge, and in the general charge informed the jury that the father's consent to the employment was necessary. The court also told the jury that, if he entered upon the service of defendant with his mother's consent, and his father was informed of it, and of the character of service he had taken, and then consented to or acquiesced in it, the verdict should be for defendant. The refusal of the court to give the requested charge is assigned as error.

Appellant argues that the mother's consent was sufficient authority for defendant to employ the minor. If this is correct, the case must be reversed, because the court made the right to recover depend on the father's consent or acquiescence. We cannot agree to the legal proposition contended for by appellant. In

Sufficiency of
mother's con-
sent.

case the husband abandon the wife, and the necessities of the family demand it, she can act as a *feme sole* in the management and disposition or sale of the community property. See *Wright v. Hays*, 10 Tex. 135; *Cheek v. Bellows*, 17 Tex. 617; *Fullerton v. Doyle*, 18 Tex. 12; *McAfee v. Robertson*, 41 Tex. 358; *Lodge v. Levertton*, 42 Tex. 20; *Heidenheimer v. Thomas*, 63 Tex. 289. These authorities are cited in support of the doctrine contended for by appellant in this case; but an examination of them will show that two things must concur to give the wife the power to sell the community property; (1) There must be an abandonment by the husband of the wife of a permanent character, or such desertion or protracted absence as leaves to her the necessary responsibility of maintaining the family; and (2) the necessity must exist to require the exercise of the power. Under the facts of this case, it will be seen at once that this principle cannot be invoked to authorize Mrs. Redeker to act independently of her husband, if the question were one of her right to sell or charge community property. However, we do see from these cases that there are circumstances under which the wife may, from necessity, become the managing head of the family, and may so act without the concurrence of her husband. The husband is by law the managing head of the family, except in extreme cases. At common law he has the right to the custody of the children, except in cases of mis-

conduct, or where the welfare of the child demands that such custody be taken from him and given to the mother, in which case the courts of proper jurisdiction will so direct. Schouler, Dom. Rel. §§ 246-248, inclusive. When the parents live together, the father, under our statute, is made the natural guardian of the persons of the minor children; where they do not live together, their rights are equal. Rev. St. arts. 2494, 2495. The *status* of the father in the family is then fixed beyond controversy by our statute. As natural guardian of the children he has the right to their custody and control. We think that his authority and dominion are exclusive, at least to the extent that in general, in all matters of such importance that the consent of the parent is required to legalize or justify an act or transaction with or concerning a minor, and the parents are living together, the consent of the father is required, and the consent of the mother will not suffice. There are no facts in this case that should make it an exception to the rule. The parents were living together. The father was necessarily absent from his home the most of his time, following his occupation of engineer, but stopping at home when his business did not call him away. We do not see any fact in the case that would change his ordinary relations with his family, or affect his rights and privileges with them. Hence, we conclude that Mrs. Redeker's permission to her son, if it had been full and complete, that he could take employment with defendant as a brakeman on a construction train, did not justify defendant in making the contract, or in retaining the minor in such employment, after information that he was a minor. When it was ascertained that he was a minor, it was the duty of defendant to obtain the father's consent. Defendant's agent, who employed the minor, and had authority to discharge him, knew his father and had been at his house. He took the risk for his company when he retained the son in his employment without the father's consent, after notice of the fact of minority.

By general permission, plaintiff had consented that his son could follow railroading for a living, and had consented to his employment on another road as fireman. But it was in proof that firing was not as dangerous as braking, and that braking on a construction train was more dangerous than on a completed road. He had the right to direct his son in taking employment, and to select the kind of employment he should take. He had done so in the instance given. The general permission that he could follow railroading for a living did not deprive the father of specifying how and where he should work. Had the father actually consented that his son could be em-

Consent to
minor engag-
ing in rail-
roading.

ployed by defendant as a wiper or watchman or fireman, and without his consent defendant had changed the employment to be the more hazardous one of braking on a construction train, the change would have been at the peril of the company.

Plaintiff was not required to give defendant notice that his son was not permitted to serve as a brakeman. It is not shown that plaintiff knew he was in defendant's employ, and if he did it was not his duty to give the notice. If plaintiff knew of the employment of his son as a brakeman, and acquiesced in it, his acquiescence would be equivalent to consent. The court instructed the jury that this was the law, and that, if they should find such acquiescence, the plaintiff could not recover. We think this was all that was required. The case did not call for a charge of notice to defendant. In the opinion on the former appeal of this case the court said: "If the employer knew of the minority, it is his duty to ascertain whether the infant have a parent, or be an apprentice, and if so, to obtain the consent of such parent or the master, before making the employment." 67 Tex. 192. While the parent may consent by acquiescence no notice to defendant is required. If defendant have knowledge of the facts, defendant must obtain the consent of the parent.

The verdict was "for \$3,032 damages, and \$826 interest." Pending the motion for a new trial, plaintiff entered a *remittitur* for all the judgment but \$2,100, when the motion for new trial was refused. Defendant claims that the court erred in overruling the motion for a new trial on the ground that the verdict was excessive, and that, after plaintiff had remitted, he was entitled to a new trial because he was entitled to a verdict of a jury as to the amount due, and the effect of the court's action in accepting the *remittitur* of the excess was to deprive defendant of a trial by jury. In support of this assignment of error we are cited to the case of Gulf, C. & S. F. R. Co. *v.* Coon, 69 Tex. 730. That was a suit for damages for injuries to the person, and it required the intervention of a jury to estimate the damages, which were left, to a great extent, to their sound judgment and discretion. It was held that the law in such cases furnished no measure by which the court could determine how much of the verdict was excessive. In Thomas *v.* Womack, 13 Tex. 585, the correct rule is given as follows: "Where the law recognizes some fixed rules and principles to regulate the measure of damages by which it may be determined in how much the verdict is excessive, as in actions on contracts, and for torts done to property, the value of

Notice by
father to em-
ployer.

Excessive
damages—Re-
mittitur.

which may be ascertained by evidence, a *remittitur* of the excess may be received as an answer to a motion for a new trial on the ground of excessive damages." Where the verdict of a jury is required to fix the amount of damages, and they fix them at an excessive amount, neither the court or counsel can tell how much should be deducted to make the verdict a proper one, because the jury alone had the right to fix such uncertain damages. In this case, there was evidence showing a proper account between the parties, the principles of which are fixed by law. It was proved that the father lost 22 months' wages of his son, and that these wages were of a certain value—at least \$60 per month,—and that the father got from his son before he was hurt \$40 to \$50 per month,—say \$40,—which would for 22 months be \$880. The trip to Houston cost the parents \$29. They paid out for him at Houston \$49. The father was receiving \$75 to \$80 per month at the time of the injury, which he lost for six months, while necessarily waiting on his son,—say \$75, the least amount proved. He had to pay out at least \$300 for medicines and medical attention after his son was removed from the hospital to Ft. Worth. His mother nursed him 18 months, and it was shown that a nurse would have cost \$2 per day, or \$60 per month, \$1,080 for the item of the mother's nursing, of which, if one-half only be allowed, the item would be \$540. All of these items of expense, loss of time, and outlay were necessary, and would not have occurred but for the injury. So we see that the verdict might have been for at least \$2,248, and that the evidence furnishes the means of ascertaining the amount at the lowest estimate. The *remittitur* was for \$148 more than was necessary. Plaintiff remitted more than could have been demanded. We do not see that for that reason the verdict so reduced should not be allowed to stand. Our conclusion is that the court did not err in refusing a new trial because the verdict was excessive, or because an amount of it was remitted, since the evidence is conclusive that at least the amount for which judgment was entered was clearly authorized by the evidence. We conclude the judgment of the lower court should be affirmed.

STAYTON, C. J.—Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

Employment of Minors—Liability for Personal Injuries.—See Louisville, N. A. & C. R. Co. v. Frawley (Ind.), 28 Am. & Eng. R. Cas. 308; Fort Wayne, C. & L. R. Co. v. Byerle (Ind.), 28 *Id.* 306; Pittsburgh, C. & St. L. R. Co. v. Adams (Ind.), 23 *Id.* 408; Youll v. Sioux City & P. R. Co. (Iowa), 21 *Id.* 589, note 592; Texas & P. R. Co. v. Carlton (Tex.), 15 *Id.* 350, note 355; Pennsylvania R. Co. v. Long (Ind.), 15 *Id.* 345; Hamilton v. Galveston, H. & S. A. R. Co. (Tex.), 4 *Id.* 528.

RHODES

v.

GEORGIA RAILROAD & BANKING CO.

(Georgia Supreme Court, January 27, 1890.)

Contributory Negligence—Discretion of Minor—Province of Jury.—Under the provision of Ga. Code, § 4294, that "a person shall be considered of sound mind who is neither an idiot, a lunatic, or afflicted by insanity, or who hath arrived at the age of 14 years, or before that age, if such person knew the distinction between good and evil," it is a question for the jury whether a boy 13 years of age had such discretion as to appreciate the danger in which he placed himself while assisting at the request of the defendant's servants, in moving a car, and whether he could be guilty of contributory negligence in so doing.

Fellow-Servants—Volunteer and Employee.—A boy 13 years of age, who at the request of a railroad employe assists in moving a car upon the railroad track, is not a fellow-servant of such employe, but is a mere volunteer.

ERROR to Superior Court, Morgan County.

Action to recover damages for negligently killing plaintiff's son. The court sustained a demurrer to plaintiff's declaration, and the plaintiff brings error.

Foster & Butler for plaintiff in error.

J. B. Cumming and *Billups & Mustin* for defendant in error.

BLANDFORD, J.—The plaintiff in error brought his action against the defendant in error to recover damages for the

homicide of his son, and the following is, in substance, the declaration filed by the plaintiff: On the 8th day of October, 1887, William Rhodes, the son of plaintiff, 13 years old, was asked by one Andrew Love, an employe of the defendant, to assist in the movement, by hand, of a loaded car of defendant; it being the business of said Andrew Love to move cars as this one was being moved. This car was being shoved by hand along the side track of the defendant at its depot at Madison. In response to said request, the said William Rhodes joined defendant's employes and other persons, who, like himself, had been asked to assist at the rear end of the car. He endeavored to help push it along the side track in the desired direction. There not being sufficient room occupied by others for him to get to the car so as to make his efforts effective, "an agent and employe, seeing this, directed him, the said William, to go in front of said car, where there was no other person, and to lend his assistance by pulling." "In obedience to said

**Averments
of declaration.**

direction or request," the said William Rhodes went to the front of the car, and, seizing a round of the ladder attached thereto, commenced pulling. Other persons were behind the car, and on each side, pushing, and he alone in front pulling, and entirely out of sight of all the agents and employes of the defendant, and of the other persons engaged in moving the car. As the said William Rhodes was walking backward, and pulling with all his strength, he stumbled over a stone which was lying between the rails of said side track, and which the employes of the road were in the habit of using for the purpose of "scotching" cars when moved as this was being moved. "Being quite exhausted by his exertion in pulling, he was unable to recover himself, and those behind and on each side, not seeing or knowing of his perilous condition, continuing to shove and push said car," he was run over and killed. The agents and employes of defendant "were wanting in care and diligence in asking the said William Rhodes, a youth of tender years, to assist them in moving said car." Also, "in permitting him to assist them." Also, "they were careless and negligent in having said stone between the rails of said side track." Also, "they were grossly negligent and carelessly unmindful and indifferent of human life in putting a youth of such tender years in a position of itself so dangerous, which was, in this instance, greatly enhanced by the fact that he could not be seen by others engaged in moving said car; and there was no agent, employe, or other person engaged in moving or superintending the moving of said car, placed by said company or its employes in front of said car, or in such position as to keep a lookout ahead to see on the track, and give such notice or warning as might become necessary to prevent accident or injury to any one." To this declaration the defendant demurred, upon the ground that the same was not sufficient in law to authorize a recovery by the plaintiff. This demurrer was sustained by the court, and the plaintiff excepted, and brings the case here for review.

The main question in this case is whether one who is alleged to have been but 13 years of age had sufficient discretion as *prima facie* to know what he was doing, and be responsible therefor. It may be laid down as a general rule that a person who assumes to assist the servant of another, without being authorized so to do by the master, and while thus acting becomes injured, has no right of action against the master for his injury, upon the ground that he is a mere volunteer. But where one who was the age of 13 years assumed upon his part to assist the servants of a railroad company in moving a loaded car, and while thus employed was injured to such an extent that he

Discretion of
minor em-
ploye.

died, and such service on his part was without the knowledge or consent of the railroad company, and without any authority from the company so to act, would the company, under such circumstances, be liable for an injury to such person? If the person were an adult, there would clearly be no liability on the part of the company. But, as the declaration alleges that the person thus injured was of the tender age of 13 years, whether the company would be liable or not would depend upon the amount of discretion and knowledge which such infant had at the time. Our Code, § 4294, declares that a "person shall be considered of sound mind who is neither an idiot, a lunatic, or afflicted by insanity, or who hath arrived at the age of fourteen years, or before that age, if such person knew the distinction between good and evil." Section 4295 declares that "an infant under the age of ten years, whose tender age renders it improbable that he or she should be impressed with a proper sense of moral obligation, or be possessed of sufficient capacity deliberately to have committed the offense, shall not be considered or found guilty of any crime or misdemeanor." Our Code further declares a person under the age of 14 years incompetent to make a will, but, if of that age, he is competent as by the common law. An infant 14 years of age may act as an executor to a will, if the testator so direct. It is insisted by counsel for the defendant in error that the court should declare as a matter of law that a person 13 years of age had sufficient discretion and knowledge to render him responsible for his acts. We do not think that the court is authorized so to declare; but, in view of our Code, the court could declare that an infant who had arrived at the age of 14 years *prima facie* had sufficient capacity and knowledge of right and wrong to make him responsible for his conduct and acts; that an infant under the age of 10 years *prima facie* did not have such discretion and capacity, and could not be charged with a knowledge of right and wrong so as to make him responsible for his acts or conduct, unless it was clearly shown he had such capacity and discretion. Between the ages of 10 and 14 years, if a person knew the distinction between good and evil in the particular instances, he would be liable for his acts and conduct. But in a case like the present, where the infant is under the age of 14, before he could be held responsible for his acts and conduct it would have to be shown by proof that he knew the distinction between good and evil, and had capacity to comprehend the danger, and avoid the same. The court cannot of itself determine these questions so as to fix the responsibility upon him for his act. They would be for determination by the jury, upon the proofs submitted on the trial of the case, and we are of the opinion

that if the son of the plaintiff in error (who had not arrived at the age of 14 years) knew, or had sufficient capacity to know, the distinction between good and evil in the particular instance, and to protect himself, he would be responsible for his own conduct. And, if this should turn out to be the case, then, if the plaintiff's son voluntarily, at the request of defendant's servants, assisted said servants in moving the car, and while thus engaged placed himself in a perilous condition, in consequence of which he was killed, there could be no recovery. But, if he did not have sufficient capacity, there might be a recovery, should the jury believe the company was negligent. It is apparent from this declaration that the plaintiff's son, who was killed, was but a mere volunteer, and what he did was voluntary on his part, and without knowledge or consent of the defendant in error. Therefore, if he did have sufficient capacity, his father could not recover for his homicide. This will depend upon the facts submitted in proof to the jury.

We think what we have said on the subject of the discretion of the son is fully sustained by the case of *Nagle v. Allegheny Val. R. Co.*, 88 Pa. St. 35, in which it is decided that an infant of the age of 14 years is presumed to have sufficient capacity to be sensible of danger, and have power to avoid it, and that this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age. The court may further decide as a question of law that *prima facie* an infant under the age of 10 years has not sufficient capacity to be sensible of danger, or have the power to avoid it, and this presumption will continue until overcome by proof showing the contrary. Whether, therefore, in the present case, the plaintiff's son had sufficient capacity to be sensible of danger, and to have the power to avoid it, is a question for the jury; he being of that age at which our Code says that, if he knew the distinction between good and evil, he would be responsible, otherwise he would not be.

The plaintiff's son was not a fellow-servant with the servants of the defendant in error. To be the servant of another, there must be some contract, or some act on the part of the master, which recognizes the person as a servant, either express or implied. It is laid down as a general rule that a person who assists the servant of another in an emergency cannot recover from the master on account of the negligence or misconduct of the servant. Such servant cannot, by his officious conduct, impose a greater duty on the master than that which the latter owes to his hired servant at common law, and it is immateri-

Fellow-servants—Volunteer.

al whether the injury occurred while assisting the servant gratuitously or at the request of the latter. See *Degg v. Midland R. Co.*, 1 Hurl & N. 773; *Osborne v. Knox & L. R. Co.*, 68 Me. 49; 2 Thomp. Neg. 1045. In *Holmes v. North-Eastern R. Co.*, L. R. 4 Exch. 254, (affirmed in exchequer chamber, L. R. 6 Exch. 123,) the plaintiff was a person entitled to the delivery of a wagon-load of coals from the defendant, a railway company. The usual mode of delivery was impossible on account of the crowded state of the station. He was hence allowed by the company's station master to go to another place, where the wagon was to get the coals; and while so doing he fell through a hole, owing to the negligent keeping of the company's premises. The court held that he was engaged, with the consent of the company, in a transaction of interest to both parties, which prevented him from being there as a volunteer, and entitled him to have the company's premises kept in a reasonably safe condition, and he was allowed to recover. So, also, in the case of *Wright v. London & N. W. R. Co.*, 1 Q. B. Div. 252. In this case, the Case of *Holmes* was cited by Lord COLERIDGE, C. J., with approval. The case referred to places the liability of the company upon the ground that the plaintiff was not a mere volunteer, but was there on the company's premises for the purpose of attending to his own business, which was likewise connected with the business of the company. The plaintiff and the defendant seem to have had an interest in common in the business to be transacted. But in the present case there was no business in common between the plaintiff's son and the defendant. He was not there even as a licensee by the company. The cases which have been referred to do not sustain the contention of the plaintiff in error. We think, however, that the court erred in sustaining the demurrer to the plaintiff's declaration for the reasons we have already stated, and the judgment is reversed.

Minor Employee—Exposure to Danger—Loading Lumber Car.—For two persons of competent strength to load an open flat-car with lumber of uniform length, breadth, and thickness, by piling the same in parallel tiers one after another, is to do work which common laborers can perform without more hazard to their own security than appertains to ordinary manual labor. It requires no special skill or antecedent training, and therefore a youth 17 years of age, who engages in it as part of the business for which he was employed by the railroad company, is not unduly exposed by reason merely of being left uninstructed in the mode of doing the work, and unwarned beforehand of any danger attending it. The plaintiff having been injured by some of the lumber falling upon him, and there being no evidence that the doing of such work properly was dangerous, or that he did not know how to do it properly, or that he was wanting in capacity to know, and nothing being alleged in the declaration as to any defect in the car or any of the appliances, the court was correct in granting a nonsuit. *Sims v. East & West R. Co. of Ala.*, Ga. Sup. Ct., Dec. 16, 1889.

Same—Injuries—Use of Improper Language by Counsel in Argument.—Where a minor who was employed by the defendant as a coal-heaver, was injured while coupling cars, and claims that he was placed on duty as a switchman, a position for which he was incompetent, the plaintiff's counsel should not be allowed in his closing argument to say that it is contrary to public policy for indiscreet minors like the plaintiff, who had no means of support outside of his labor, to be employed in dangerous positions, and that "such a policy is calculated to increase pauperism, and means that you and I and the country have them to support." *Gulf C. & S. F. R. Co. v. Jones*, Tex. Sup. Ct., Mar. 5, 1889.

Employment of Inexperienced Person of Full Age.—Where the deceased at the time of the accident was nearly 22 years of age, and it did not appear that he was not physically and mentally qualified to learn and perform the duties of a brakeman, the mere fact that he was inexperienced is not sufficient to establish negligence in employing him. *Gorman v. Minneapolis & St. L. R. Co.*, Iowa Sup. Ct., Oct. 16, 1889.

CARROLL v. EAST TENNESSEE, VIRGINIA & GEORGIA RY. CO.
EAST TENNESSEE, VIRGINIA & GEORGIA RY. CO. v. CARROLL.

(Georgia Supreme Court, September 25, 1889.)

Master and Servant—Contributory Negligence—Failure to Keep Engineer Awake—Instructions.—Where the want of care and diligence imputed to the plaintiff, who was a fireman upon a locomotive, relates to his failure to keep the engineer awake, or take other measures for his own safety, and the imputed negligence reaches back some hours, a paragraph of the court's charge to the jury, which might be understood by them as restricting the inquiry to a much shorter period, is erroneous; and for the court, in the same paragraph, to specify certain conduct of the fireman, and instruct upon it in a way to imply that the same would not be negligence, is additional error, the question whether such conduct would or would not be negligence being for the jury.

Same—Duty of Fireman.—The measure of risk which a fireman ought to incur by remaining upon a locomotive, and assisting a sleeping engineer to run the train, is that only which his duty and obligations to the company, under all the circumstances, impose upon him. If he subjects himself to any greater risk, and is thereby injured, he is not without fault, and cannot recover.

Same—Evidence—Admissibility of Reports to General Manager.—Reports to the general manager of the company touching the facts, circumstances, and results of a railway accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and of several other employes, are not admissible in evidence to affect the company, whether such reports were exacted and made under standing rules requiring the same, or under special orders for the particular occasion; no question of notice to the company being involved in the controversy.

Same—Relief from Dangerous Position—Evidence.—It being in question whether a fireman could, by reporting the facts of his situation to an official of the company by telegraph, have obtained relief from his peril, evidence is admissible to show that, under the usage and practice of the company in like or analogous circumstances, relief would probably have followed in a specified way, and by the use of specified means.

Same—Rules of Company.—An employe of a corporation, though obligated in writing, as terms of his employment, to "study the rules governing employes, carefully keep posted, and obey orders," is not bound by rules, as such, of which he is ignorant, and which have never been promulgated to him by the company.

ERROR from Superior Court, Bibb County.

Dessau & Bartell for plaintiff.

Bacon & Rutherford for defendant.

BLECKLEY, C. J. 1. The case was tried at the November adjourned term, 1887, and the motion for a new trial was made during the same term; the hearing of the motion being fixed by order for a day in vacation, and then continued to the following May term. Other continuances took place during the May term, each of them being to a particular day. One of these days was June 30th, on which no action was taken with reference to the motion. On July 2d the motion was taken up, and continued to a subsequent day in the same month, and on the latter to a still later day, when it came up for a hearing, and the respondent moved to dismiss it because no continuance from the 30th of June to the 2d of July had been granted or entered. The motion to dismiss was properly overruled, because, after the May term of the court was reached by duly continuing the motion from the November adjourned term, no further continuance was requisite in order to keep the matter in court so long as the May term lasted; and that term, as we understand the record, was still in progress when the motion for a new trial was finally taken up and decided. The rule as to continuance from day to day in vacation has no application to what transpires in term time. Once in court the motion remains there until heard or otherwise disposed of. Fixing a time for the hearing, or entering continuances from day to day, is no disposition of it.

2. The court committed no error in granting the motion for a new trial on the fourteenth and seventeenth grounds of the amended motion. The most vital question in the case was one of fact, to-wit, whether the plaintiff was negligent in remaining upon the engine, and exposing himself to risk, without taking more active and diligent measures to keep the engineer awake, or urging the conductor to do so, or telegraph-

Contributory
negligence—
Sleeping en-
gineer.

ing to the master of trains or some other officer to interpose. That the engineer was falling asleep at his post was known to the plaintiff, who was his fireman, some time before the collision happened, and consequently the question of his negligence should not have been restricted in point of time to the moment of collision, and some minutes previous thereto. The charge of the court in the fourteenth ground of the motion was as follows: "If the jury should believe, from the evidence in the case, that the train on which the plaintiff was as fireman was approaching another train on the same track; that the engineer of plaintiff's train was at some distance from the latter train, at his post and awake, discharging his duty; that the plaintiff did not know of the approaching train; and that the plaintiff, having finished firing his engine, took his seat on the place assigned to him, and then, discovering a train ahead, and that his engine was not slacking, and that the engineer was asleep,—then I charge you that if the plaintiff was injured by a collision which he could not have avoided by the exercise of all reasonable care and ordinary diligence, in the causing of which no fault was committed by or attributable to him, he may be entitled to recover." This might have been understood by the jury as virtually throwing out of the case any and all negligence the plaintiff may have been chargeable with until just before the collision took place, and was, besides, an intimation to the jury that the conduct of the plaintiff, if as described in the charge, would not amount to negligence. But for this instruction, the jury might have thought, in view of what had already transpired within the plaintiff's knowledge showing the tendency of the engineer to go to sleep, that it was not enough for the plaintiff to see that he was awake, and then seat himself at the place assigned to him, but that he ought to have continued to see to it and assure himself that the engineer kept awake. The charge seems obnoxious to both objections which we have indicated, viz., a too narrow restriction in point of time, and a too wide latitude in drawing to the court and taking from the jury a decision of the question of negligence.

3. The request of counsel for the defendant to charge the jury as set out in the seventeenth ground of the motion for a new trial was as follows: "If you find that the said Carroll was an employe of the defendant, and that he subjected himself to any greater danger or risk than his duty and obligations to said company required, and that by reason of said increased danger or risk he has been injured, then the court charges you that he cannot recover." In view of the testimony in the record, we agree with the court in thinking that this

Assumption of
risk by re-
maining on
engine.

charge should have been given in the terms requested, and without any qualification. If the plaintiff took any improper risk, it was by remaining upon the engine without doing more than he did in seeing that the engineer kept awake, or without appealing to the conductor or reporting by telegraph, as it was contended he should have done. If he was in fault in either of these respects, he was negligent, and, if negligent, he could not recover. The court, in giving the request in charge to the jury, qualified it by adding, after the word "required," the phrase, "by any rules, which rules had been communicated to him." This qualification narrowed the charge to a violation of the rules; whereas the plaintiff's duty to protect himself against his sleepy engineer might be as complete and obligatory without rules on the subject as with them. The jury might have thought that, if he had common sense, he ought not, under the circumstances, to have remained passively upon the engine, with knowledge that the engineer was going to sleep at intervals while in charge of his engine. Due care in keeping the engineer awake, or, if that could not be done, by ceasing to aid in running the train, involved not only the safety of the fireman, but that of others, and also the preservation of the company's property from wreck and destruction.

4. We turn now to the cross bill of exceptions, in adjudicating upon which we find that the court should have granted

Evidence—Admissibility of report to general manager.

a new trial on two grounds, to-wit, the second and third of the amended motion. By a standing rule of the company, as may be inferred, reports by its officers and employes were to be made to it of the facts and circumstances attending accidents. This accident occurred on the 8th of February, and on the 18th of that month the superintendent prepared a report to the general manager on the subject. On the following day, the 19th, a report by the conductor, supported by his affidavit and that of several others, embracing engineer, fireman, flagman, brakeman, and another conductor, the plaintiff himself being one of the affiants, was made, and, as we infer, was transmitted through the superintendent, and, along with his report, to the general manager. The report of the conductor cast the whole blame on the engineer, treating all the rest of the crew as faultless. These documents were admitted in evidence on behalf of the plaintiff, over the defendant's objection. Having had their origin many days after the happening of the events to which they related, they were no part of the *res gestæ* of the cause of action on trial, but were mere narrative touching past occurrences. Consequently they do not fall within the principle of the case cited from 66

Mich. 390, 31 Am. & Eng. R. Cas. 399; *Keyser v. Chicago & G. T. R. Co.*, decided by the supreme court of Michigan in June, 1887. Mechem, Ag. §§ 714, 715; Code, § 2206. Nor is *Carlton v. Western & A. R. Co.*, 81 Ga. 531, (October term, 1888), a decision upon the question of their admissibility. As far as that case goes is to suggest that they were not confidential communications, but, really, even that question was not involved so as to render a decision of it necessary. Upon principle, we think it clear that these reports were inadmissible; and several authorities which we deem sound are to that effect. In *Langhorn v. Allnutt*, 4 Taunt. 511, it was held that letters of an agent to a principal, in which he is rendering him an account of the transactions he has performed for him, are not admissible in evidence against the principal. A like ruling was made in *Reyner v. Pearson*, *Id.* 662. See, also, *Kahl v. Jansen*, *Id.* 565. "An official statement or report received by the corporation or board from one acting as officer, and accepted and adopted by them, is competent evidence against the corporation, and those bound by its acts, without further proof of the appointment of the officer; but a report to a corporation or board is not made admissible in evidence against it by the mere fact that it was received and 'accepted' by it, except for the purpose of charging it with notice of the contents." Abb. Tr. Ev. p. 51, § 62. "An admission by a corporation of a fact or liability, duly and properly made, is, of course, evidence against it; but a municipal corporation, by accepting, that is, by receiving, the report of a committee of inquiry, does not admit the truth of the facts stated therein; and such a report, though accepted by the vote of the corporation, is not admissible in evidence against it." 1 Dill. Mun. Corp. (3d Ed.) § 305, (earlier editions, § 242.)

The case of *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 27 Am. & Eng. R. Cas. 291, was cited and relied on in behalf of the plaintiff. The opinion was delivered by Mr. Justice GRAY, who devotes but a single sentence to the question, merely saying: "The reports made by the superintendent to the board of directors in the course of his official duty were competent evidence, as against the corporation, of the condition of the road." Looking to the statement of facts prefixed to that opinion, we find it represented that "the plaintiff offered in evidence two printed reports made by the superintendent of the road to the board of directors,—one in 1877, which stated that, in the portion of the road where the heaviest traffic was done, there were about 35 miles of iron that had been run over for more than 25 years, and required the closest attention to prevent accidents; and

the other, made in 1880, stated that there were 25 miles of track made of iron 42 years in service, and now almost entirely worn out. The defendant objected to the admission of these reports because they were not sworn to under examination in court: because they had no reference to the place of the accident, but only to the general condition of the rails; because they could not bind the defendant as admissions; and because the information of the superintendent as to the condition of the road was derived, in part, from the reports of subordinates. But the court overruled the objections, and admitted the reports in evidence." According to this statement, the reports were printed, and in all probability had been promulgated by the company as official documents adopted by and proceeding from it. If so, this would make them utterances of, and therefore admissions by, the company. Moreover, had they not been printed and promulgated, they would have tended to show that the company had notice of the condition of its road previously to the occurrence of the injury in controversy, and would have been admissible to charge the company with such notice, under the rule as above quoted from Abbott. The reports now in question do not relate to the condition of the road, and have no bearing upon any question of notice to the company of any fact whatsoever prior to the injury; their contents consisting wholly of historical matter touching past conduct, and its consequences. So far as appears, the truth of the reports was never in any way passed upon, adopted, or affirmed by the corporation; nor were the documents printed, issued, or circulated by it as true. It surely cannot be sound law to hold that by collecting information, whether under general rules or special orders, and whether from its own officers, agents, and employes, or others, a corporation acquires and takes such information at the peril of having it treated as its own admissions, should litigation subsequently arise touching the subject-matter. As well might it be considered that any and every suitor who sends out agents to discover witnesses and collect facts touching his rights or duties regarding a pending or prospective lawsuit is to be met at the trial with the communications made by or to such agents as admissions made by himself. Can it be possible that a collector of historical materials is to be held responsible for the truth or accuracy of them, without himself having indorsed or promulgated them as true?

The case of *Krogg v. Atlanta & W. P. R. Co.*, 77 Ga. 202, was also cited and relied upon. The evidence held competent in that case consisted of declarations made by the general manager, some of them relating to the condition of the

track, and some to the cause of the accident, which he attributed to too much elevation of the superstructure on one of the curves of the road. It would seem that the admissibility of this evidence was put by the court partly on the ground that the general manager represented the corporation in making the statements, (which, by the way, were not made as reports to the company, or any superior officer, but as mere oral declarations), partly upon the ground that they were embraced in the *res gestæ*, and partly upon the ground that they showed his knowledge, and therefore the knowledge of the corporation, as to the improper construction and condition of the road before the accident. We need not comment upon this case further than to observe that its facts are so different from those of the case in hand that the one cannot be a precedent for the other. An officer so high in power and position, and so comprehensive in his duties, as is the general manager of a railroad, might possibly be competent to affect the company by his admissions or declarations when like admissions or declarations proceeding from subordinate officers or agents, or from mere servants and employes, of the company, would be attended with no such admissible quality. Certainly, this distinction could well be drawn where the declarations of subordinates, etc., were made to the company some time after the transaction to which they relate, and were elicited for the sole purpose of its own information, and for use in guiding its own conduct.

5. We see no substantial objection to the question propounded to the witness Gallagher, as set out in the sixth ground of the amended motion, the object being to show what according to the usage and practice of the company, would have been the result had the plaintiff reported by telegraph to the train dispatcher that the engineer was falling asleep at intervals while on his engine. In order for the jury to determine whether such a report would have been available to terminate or lessen the plaintiff's danger, it would be necessary for them to know what action would probably have been taken upon such a report. Perhaps the question to the witness could have been better shaped; but, on the whole, we think the court erred in not allowing the witness to answer it.

Evidence—Usage of company.

6. As there has to be another trial, we forbear to express any opinion on the correctness of the verdict; and, as to the grounds of the motion not already discussed, we merely say that we have discovered in most of them no error whatsoever, and in none of them anything sufficiently material to require correction. Several of the grounds involve, directly or indirectly, the question

Rules of company—Knowledge of company.

of duty, on the part of the plaintiff, to inform himself of the rules of the company, and abide by them, whether they had been communicated to him or not. We agree with the trial judge that the undertaking of the plaintiff in his written application to the company for employment, to "study the rules governing employes, carefully keep posted and obey them," did not extend to any unknown rules not promulgated to him by the company. *Brunswick & W. R. Co. v. Clem*, 80 Ga. 540, 541, fifth head of the opinion. The rules of a railway company stand to its employes as laws for the regulation of their conduct, and all such laws ought to be promulgated in some reasonable, practical way. If they are written or printed, each employe should either be furnished with a copy, or informed where to apply for it, or, at least, where he might call and read the rules, or hear them read. Of course, actual knowledge otherwise acquired would suffice; but it is clear to us that an employe is bound by no rule of his company which has neither been communicated to him by it, nor brought to his knowledge otherwise. Judgment in the main case affirmed; on the cross-bill of exceptions reversed.

Evidence—Admissibility of Report of Accident.—See *North Hudson R. Co. v. May* (N. J.), 27 Am. & Eng. R. Cas. 151.

Evidence—Competency—Incompetency of Engineer—Record of Accidents.—When an employe sues a railroad company for injuries alleged to have been caused by the negligence and incompetency of the engineer in charge of the train, he may introduce in evidence, for the purpose of proving the carelessness and incompetency of the engineer and the defendant's knowledge thereof, a book kept by the defendant's agent, containing an account of accidents on the road, showing that the engineer had been suspended for allowing a non-employe and an incompetent person to run his engine, during which time an accident occurred. *O'Hare v. Chicago & A. R. Co.*, 95 Mo. 662.

Rules—Neglect to Observe Requirements.—Displaying Signals.—Where the rules of the company imposed upon the deceased the duty to display a signal when at work under a car, the fact that this duty applied to another person as well who also failed to observe its requirements does not excuse the neglect of the deceased. *Central R. & B. Co. v. Kitchens*, Ga. Sup. Ct., May 22, 1889.

Same—Ring of Engine Bell—Parol Proof.—In an action by a switchman to recover damages sustained through being run over in the defendant's yard, parol proof that the defendant's rules required the engine bell to be rung, is properly received when it does not appear that there is a better kind of proof of such regulation. Independently of rules prescribed by the company, the law would imply a duty to give a signal of the movement of an engine under the circumstances. *Sobieski v. St. Paul & D. R. Co.*, Minn. Sup. Ct., July 2, 1889.

Same—Parol Proof of Rule Attached to Applications for Employment.—Where a rule of the company was printed on applications for employment, and was required to be signed by applicants obtaining positions, and was supposed to be known to them, evidence of the existence of the rule cannot be admitted except by producing the writing itself, or accounting for

its absence, and showing that the deceased had signed it and knew of its existence. *Missouri Pac. R. Co. v. Lamothe*, Tex. Sup. Ct., Feb. 14, 1890.

Same—Admissibility of Book Containing Rules.—Where the evidence is sufficient to show that the rule book offered, contains the rules of the company in force when the employe was injured, the book is admissible, without first proving that the employe had knowledge of the rules which it contained. His knowledge was matter for either prior or subsequent proof. *Parker v. Georgia Pac. Ry. Co.*, Ga. Sup. Ct., Oct. 28, 1889.

Same—Duty of Company to Prescribe Rules—Instructions.—Where the complaint contained no allegation that a railroad company had neglected to prescribe suitable rules and regulations for the government and management of its trains, employes, and business, it was error in the court to charge the jury in relation to such duty. *Woodward v. Oregon Ry. & Nav. Co.*, Or. Sup. Ct., Jan. 6, 1890.

Same—Applicability—Displaying Signal—Car-Repairer.—Plaintiff, a car repairer, was injured by an engine backing against a moving car under which he was at work in the company's repair yard. The rules of the company required that car repairers should protect themselves by placing a blue signal on the draw-head, platform, or steps of cars standing on the main track or side track. *Held*, that as the car under which plaintiff was at work was not on the main or side track but in the repair yard, the rule was not applicable, and that a general verdict in his favor must stand, notwithstanding special findings that the plaintiff failed to exhibit the signal. *Quick v. Indianapolis & St. L. R. Co.*, Ill. Sup. Ct., Oct. 21, 1889.

Same—Getting Upon Engine in Violation of.—The deceased on the night of the accident was detailed to watch the track for a certain distance and to give warning of any signs of danger that he might discover. His orders were peremptory to be vigilant and to walk backwards and forwards over the track between the points indicated. He signaled to a construction train to stop and got upon the locomotive. The locomotive was derailed by a wash-out on the roadbed. The rules of the company provided that "no person shall be permitted to ride on an engine without an order from the superintendent, or superintendent of motive power, except the engineman, fireman, road foreman of engines, trainmasters, assistant engineers and supervisors on their respective divisions, and conductors in discharge of their duties." The rules were printed and copies had been duly furnished to section-foremen. The deceased had been in the employ of the company as a section hand for many months prior to the accident, and presumably was acquainted with the rule quoted. *Held*, that the deceased being chargeable with notice of the rules and being on the engine contrary to the rules and his instructions, no recovery could be had for negligence resulting in his death, and that it was immaterial that those in charge of the engine did not object to his getting upon it. *Shenandoah Valley R. Co. v. Lucado's Administrator*, Va. Sup. Ct. App., Dec. 5, 1889.

Same—Omission to Prescribe—Duty of Employe—Evidence of Usage.—Where the rules furnished by the company to brakemen do not contain any regulations concerning the duty of brakemen to obey the orders of the conductor, a witness may testify as to what he knows from his experience on various roads concerning the duty of brakemen in that respect. *Gorman v. Minneapolis & St. L. R. Co.*, Iowa Sup. Ct., Oct. 16, 1889.

Same—Construction—Duty to Report Defect.—Where the rules of the company required telegraph operators "to report defects in roads, or bridges, or obstructions of any kind wherever met, to the superintendent, and, if possible, to the nearest section master or bridge foreman," it is their duty to make reports as required, whether they are requested to do so by any other employe or not, if they know of the existence of the rules. *Hall v. Galveston, H. & S. A. R. Co.*, 39 Fed. Rep. 18.

SOUTHERN KANSAS R. CO.

v.

ROBBINS.

(Kansas Supreme Court, February 8, 1890.)

Deposition—Admissibility—Absence of Party.—A deposition taken in the absence of the opposing party, a short distance from the office stated in the notice, will not be suppressed, where it appears that on the same day the counsel for the opposing party appeared, and by consent of all the deposition was opened, and the witness recalled and cross-examined.

Negligently Causing Death—Reputation of Deceased for Carefulness.—Where one of the issues to be tried is whether the person injured was in the exercise of ordinary care, and there were eye witnesses as to his conduct at the time of the injury, the opinions of experts as to whether he was generally a careful and skillful man is not competent evidence.

Same—Evidence—Practice of Others in Climbing Ladder.—Evidence of the practice and usage of others in climbing the ladder of a box car when a train is in motion, such as deceased fell from, is not admissible to prove due care on his part at the time of the accident.

ERROR from District Court, Franklin County.

George R. Peck, A. A. Hurd and Robert Dunlap for plaintiff in error.

H. P. Welsh and John W. Deford for defendant in error.

JOHNSTON, J.—On June 30, 1886, John F. Patterson was employed in the service of the Southern Kansas Railway Company, as a passenger conductor. At that time **Facts.** a Sunday school assembly was in session at Ottawa, and the railway company were running excursion trains from several points in the state to that place. On the morning of the day mentioned, Patterson went from Ottawa to Lawrence in charge of a passenger train, where it was loaded with excursionists bound for the assembly at Ottawa. On the return trip he stopped at Baldwin City, where there were a number of people intending to join the excursion to Ottawa, and, being short of passenger cars to accommodate them, the company had placed two cabooses and a box car temporarily arranged for passengers, on a side track, and directed Patterson to attach them to the rear of his train, for the use of passengers. There is testimony to the effect that Patterson was directed to place the cars in his train in the same order that they were standing,—first a caboose, then the box car, and then another caboose; and this was the order in which they were attached to the train. After the train left

Baldwin City, Patterson proceeded to collect fares, beginning at the front, and passing towards the rear, of the train. When he had completed taking fares in the first caboose, he passed out of the rear door, and proceeded to climb over the box car, in an effort to reach the other caboose, in which there were passengers. There were no doors in the ends of the car, nor any platforms on the ends of the same, and the only way to get over the car was to climb up a ladder on the side and near the corner of the car, made of iron rods, called "hand-holds" or "rungs," which were screwed to the side and top of the car. These rods were about a foot apart, and extended out from the side of the car about three inches. While he was in the act of ascending this ladder, the train was running at a rapid rate, and just as it passed over a bridge he in some way fell from the car, and was fatally injured. The witnesses who saw the occurrence state that he had nearly reached the top of the car, when he appeared to grasp with one hand for a rung which should have been upon the top of the car, but probably was not, and at the same time let go his hold upon the top rung on the side of the car with the other hand, when he reeled back, and fell from the train. He was found lying in the angle of two braces of the bridge, his skull fractured, and his left leg broken. He was unconscious when found, and remained so until his death, which occurred the day of the accident. This action is brought by the representative of the deceased, to recover damages for the benefit of the widow and child, it being alleged that his life was lost in consequence of the negligence of the railway company. The company alleged and contended that Patterson was guilty of negligence contributing to the accident. The plaintiff prevailed, and recovered a judgment for \$5,500.

Errors are assigned here upon the rulings of the court in admitting evidence. The deposition of a witness was received that was not taken in the exact place stated in the notice. The notice named the office of Winslow P. Hyatt, Colorado street, Pasadena, Los Angeles county, Cal., as the place of taking the deposition but, as he had moved about a block away on another street, the notary met the plaintiff's attorney at that place at the proper time, and adjourned the taking of the deposition to another office, on another street in Pasadena, and there the deposition was continued, completed, sealed up, and properly addressed. In the afternoon of that day, the attorney for the defendant was found, and informed what had been done, and by consent, the deposition was then opened, and the witness was recalled and cross-examined by defendant's attorney.

Admissibility
of deposition.

The court properly refused to suppress the deposition. The taking of a deposition at another place than that stated in the notice, in the absence of the opposing party, is a sufficient objection to the deposition; but the irregularity was cured by the voluntary appearance of the defendant's counsel at the place where the deposition was taken, and his participation in the proceeding. It is important that the deposition should be taken at the place mentioned in the notice; but the notice is only given to furnish the opposing party an opportunity to appear, and therefore the appearance waives a defect in the notice or the irregularity of a change in the place of taking the deposition. None of the objections to the deposition can be sustained.

A witness was asked, and over objection was permitted to state, whether the deceased was a careful and skillful railroad man. This was clearly erroneous. The question of whether Patterson exercised due care in this particular instance was an important issue. It was alleged that he was guilty of negligence, and it was contended that the absence of the hand-hold on the top of the car was an obvious danger, and apparent to any one, and that to ascend a perpendicular ladder in the manner in which he did, by letting go his hold of the rung on the side of the car before laying hold of the rung on the top of the car, was negligence. The issue of his want of ordinary care was before the jury, and there was much testimony submitted concerning his conduct at the time of the injury. There were eye witnesses present who at the trial described the manner in which he ascended the ladder, and the care which he exercised at the time the accident occurred; and hence there was no necessity nor propriety in admitting the opinion of an expert as to whether he was generally a careful and skillful man. The determination of whether he was exercising due care when he fell from the car does not depend upon the care exercised by him at other times, or whether he was usually careful in the performance of his duties as a railroad man, but does depend upon his conduct at the time of the accident. The witness who gave the testimony was a conductor on the same railroad, had been acquainted with him for a year, and claimed to have the means of knowing as to whether he was a careful railroad man, and his testimony may have had much weight with the jury in determining that the deceased was in the exercise of due care. With the evidence before them as to the care he used at the time, the jury could determine better than any expert whether or not he was negligent; and the fact that he was generally careful would be unavailing if the testimony showed that his negli-

**Reputation of
deceased for
carefulness.**

gence in this instance contributed to the injury. Testimony of this character is no more admissible than an offer by the railroad company to show his want of care at the time of the accident by proving that he was negligent at other times, or generally careless. Exceptions are made in some cases where there are no eye witnesses of the accident, and better evidence cannot be obtained as to whether the injured person exercised due care; but all the authorities hold such testimony to be inadmissible where the testimony of persons who witnessed the accident is available. *Bryant v. Central Vermont R. Co.*, 56 Vt. 710; *Dunham v. Rackliff*, 71 Me. 345; *Hays v. Millar*, 77 Pa. St. 238; *Tenney v. Tuttle*, 1 Allen (Mass.), 185; *McDonald v. Savoy*, 110 Mass. 49; *Chase v. Maine Cent. R. Co.* (Me.), 19 Am. & Eng. R. Cas. 356; *Morris v. Town of East Haven*, 41 Conn. 252; *Baldwin v. Western R. Co.*, 4 Gray (Mass.), 333; *Central R. & B. R. Co. v. Roach*, 64 Ga. 635, 8 Am. & Eng. R. Cas. 79; *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113, 15 Am. & Eng. R. Cas. 261; *Elliot v. Chicago, M. & St. P. R. Co.*, 5 Dak. 523, 38 Am. & Eng. R. Cas. 62; 1 Greenl. Ev. § 84. Neither was the testimony introduced in regard to how railroad men should and do ascend the ladder of a box car relevant nor competent. The practice followed by others throws no light on the case used by Patterson in this case. It is not claimed that the opinions of experts are necessary in the case, and to allow testimony as to how others climbed the ladder would be to create collateral issues as to the prudence of their conduct, and to unnecessarily protract the trial. The question of whether Patterson was guilty of such negligence as would preclude a recovery was an issue before the jury, and the practice or usage of others would not tend to prove care on his part, and such testimony should not have been received. *Chicago, R. I. & P. R. Co. v. Clark*, *supra*; *Lawrence v. Hudson*, 12 Hiesk. (Tenn.), 671; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576, 17 Am. & Eng. R. Cas. 564; *Gulf, C. & S. R. Co. v. Evansich*, 61 Tex. 3; *Bryant v. Central Vermont R. Co.*, *supra*; *Bailey v. Northampton Co.*, 107 Mass. 496; *Koons v. St. Louis & I. M. R. Co.*, 65 Mo. 592; *Crocker v. Schureman*, 7 Mo. App. 358; *Cleaveland v. New Jersey Steamboat Co.*, 5 Hun (N. Y.), 523; *Lawson, Usages & Cust.* 328.

To account for the fall, a witness, who was not present at the time, gave the following testimony: "Question.

You say you have passed over this road a great many times? Answer. I have. Q. And over this bridge? A. Yes, sir. Q. Now, can you state to the jury, under the circumstances which surrounded Mr. Patterson there, whether or not there was any cause

Practice of others in climbing ladder.

why he should have ascended that car with great speed and haste, and, if so, what that cause was? Explain to the jury. A. Well, the way that man started in to go up the side of the car, he couldn't see the bridge when he started, and at the speed the train was running, and him climbing up the side of the car, by the time the engine struck the bridge, he would be towards the top, and when he heard the thundering noise that the engine makes when it strikes a bridge, he hurried to get on top of the car." This testimony was given over the objection of the plaintiff in error. The witness was the conductor of another train, who was far away when Patterson fell from the box car. He did not know and could not state whether Patterson could see the bridge when he started to ascend the ladder, nor how far he had ascended when the bridge was reached; neither was he competent to state what causes operated on the mind of Patterson that led him to ascend the ladder with great speed and haste. The admission of the incompetent testimony was error, for which the judgment will be reversed, and the cause remanded for a new trial; all the justices concurring.

Evidence—Admissibility of Testimony as to Reputation for Carefulness.—See *Baltimore & O. R. Co. v. Colvin* (Pa.), 32 Am. & Eng. R. Cas. 160; *Chase v. Maine Cent. R. Co.* (Me.), 19 *Id.* 356; *Chicago, R. I. & P. R. Co. v. Clark* (Ill.), 15 *Id.* 261.

SMITH

v.

WRIGHTSVILLE & TENNILLE R. CO.

(*Georgia Supreme Court, November 18, 1889.*)

Master and Servant—Contributory Negligence—Apprehension of Danger.—Where an employe of a railway while engaged in the performance of duty, in running a hand car, was put in sudden apprehension of a dangerous collision with a locomotive approaching from an opposite direction, and the threatened collision was due alone to the negligence of the company, whether it was rash or reckless to leap from the car, or whether he should have remained upon it, or left it by means less hazardous than jumping, are questions not clear enough, under the facts of the present case, to justify the granting of a non-suit. The allowance rightfully to be made for indiscreet conduct under excitement and alarm can better be determined by a jury than by the court.

Writ of Error—Dismissal—Time for Perfecting.—To avoid dismissing a writ of error because it does not appear when the court adjourned, or that the bill of exceptions was certified within 30 days thereafter, time will be allowed, under section 4272 of the Code, to perfect the transcript by obtaining the proper certificate from the clerk as to the date of adjournment.

Bill of Exceptions—Alterations—Fraud.—In the absence of any suggestion

that alterations appearing in the bill of exceptions were made fraudulently, or after the bill of exceptions was certified, they will generally be treated as having been made fairly, and before the certificate was signed by the judge. Upon a suggestion of fraud, or that the erasures, interlineations, etc., are of later origin, this court will, from inspection of the documents, or from inspection and other proper evidence, decide the question.

ERROR from Superior Court, Johnson County.

W. R. Daly, J. M. Stubbs and Harrison & Peebles for plaintiff in error.

A. F. Daly and O. H. Rogers for defendant in error.

BLECKLEY, C. J.—The plaintiff was in the employment of the defendant as a "section boss." He had control of a hand car and of a company of workmen, a force of a dozen men. With himself and all the men on Facts. board, he was proceeding, in the line of his duty, upon the car, to reach a certain station at which a regular train was to pass him. He was not out of time, but was entitled to the track, and, had he not been obstructed, could have reached the station by the time the other train was to arrive there. His car was running rapidly, by gravity or its own momentum, down a descending grade; the speed being about 15 or 20 miles an hour, which was not unusual under similar circumstances. He had no reason to anticipate being met by a locomotive, as, according to the schedules of the road, there was none due: but, while upon the descending grade, he looked ahead, and saw a locomotive approaching rapidly—25 miles an hour—at the distance of about 300 or 350 yards, the same having just passed the point of a curve. It, as well as his own car, was running down grade, and between them was an intervening trestle. The plaintiff immediately gave orders to his men to apply brakes; but, instead of obeying, they commenced leaving the car. He repeated the order, but no one obeyed. They all got off, except one man; and the plaintiff, seeing this, undertook to get off, himself. He attempted to jump obliquely forward, so as to avoid alighting upon the track; but, striking probably against some part of the car, his direction was changed, and he fell in front, upon the track, was run over, and seriously injured. His car had by this time approached to within about 100 yards of the trestle, and the locomotive was within perhaps 30 to 75 yards of it on the opposite side; both being in motion. No collision took place, and, had the plaintiff remained upon the car, he would probably not have been injured. The car was about three feet high, and, had he taken a seat on the side of it, he could easily have gotten off; but he was excited, alarmed, and confused, and, his position being near the front end, he at-

tempted to save himself by jumping, instead of by sitting down on the side, and getting off in that way. The mode of applying brakes to the car was to introduce poles through holes made for the purpose, and then press the poles against the wheels. It required four men, one to each wheel. The court granted a nonsuit.

1. There can be no question that the company was negligent in running upon the track, to the use of which the plaintiff was entitled for the time being, a "wild" locomotive, or one of which he had no warning, either by schedule or by any other form of notice. Thus the misconduct of the company in threatening the plaintiff with a collision may be taken as established.

Contributory
negligence—
Apprehension
of danger.

The open question is whether the plaintiff, after discovering the danger, acted recklessly or rashly, and thus brought upon himself a calamity which he might have avoided by more discreet conduct. All the authorities concur in holding that the duty of a person for his own safety, in such an emergency, is not to be measured by the ordinary standard, but that allowance is to be made for the state of his emotions. The authorities to this effect which might be cited amount to scores, if not hundreds. *Whit. Smith*, Neg. 392, notes; *Beach*, Contrib. Neg. § 14; *Whart. Neg.* § 304; *Patt. Ry. Accident Law*, 62; 1 *Shear. & R. Neg.* § 89; 2 *Thomp. Neg.* p. 1092, § 8; p. 1174, § 20; *Roll v. Northern Cent. R. Co.*, 15 Hun (N. Y.), 496, affirmed 80 N. Y. 647; *Gumz. v. Chicago, St. P. & M. R. Co.*, 52 Wis. 672, 5 Am. & Eng. R. Cas. 583; *Railroad Co. v. Paulk*, 24 Ga. 356; *Railroad Co. v. Rhodes*, 56 Ga. 645; *Central R. & B. Co. v. Roach*, 64 Ga. 635, 8 Am. & Eng. R. Cas. 79; *Central R. Co. v. Crosby*, 74 Ga. 738. In collision cases on railways the emotional element is a powerful factor. It enters both into the question of liability and the measure of compensation. With as much truth as force and elegance was it said by STEPHENS, J., in *Cooper v. Mullins*, 30 Ga. 152: "Surely, there ought to be some compensation for the suffering endured. The pain from the wounds must have been great, and the dread of the approaching collision between the two engines, though brief, must have been terrible. Mental agony has been known to turn a head gray in a night, and gray hairs are often but the effervescence of some great mental anguish." Questions involving deep emotions, and conduct dependent thereon, are generally not mere questions of law, or such as can be disposed of by the logic of the bench. They can best be determined by practical jurors, "on a view of all the facts and circumstances bearing on the issue." We do not decide that the plaintiff ought to recover, nor do we think that the court below should have decided that he ought

not. "If the facts are clear and undisputed, and show that the plaintiff was guilty of contributory negligence, the judge may direct a nonsuit, because, if that is clearly shown, the plaintiff has failed to prove his case, which is that the damage is caused by the negligence of the defendants, and therefore the question of contributory negligence does not arise; but if there is a question of fact and an issue of contributory negligence, or there are two reasonable but different views which may be taken, such questions must be left to the jury. Such questions are often very difficult for the jury to decide, and each case will depend upon its own peculiar facts, and cannot be settled by any general rules." Whit. Smith, Neg. 391. The court erred in granting a nonsuit.

2. When this case was called for argument, counsel for the defendant moved to dismiss the writ of error on two grounds, the first of which was that it did not affirmatively appear that the bill of exceptions was signed by the judge within 30 days after the adjournment of the court at which the judgment complained of was rendered. Signature of bill of exceptions. It is usual for the bill of exceptions to state that it is tendered for signing within the requisite period after adjournment, but the language of this bill is that it was tendered within 30 days after the trial. It shows, also, that the trial must have taken place on or before the 25th of March, 1889, for the judgment of nonsuit was granted on that day. The certificate of the judge to the bill of exceptions bears date April 27, 1889, which, of course, is later than 30 days after the trial. To meet this ground of the motion the plaintiff produced a certificate of the clerk of the superior court, to the effect that the March term, 1889, as appears from the minutes of the court, adjourned on the 30th day of March, and asked leave to have the record perfected by an order to the clerk to certify regularly the time of adjournment, citing section 4272c of the Code, which says: "No writ of error shall be dismissed in the supreme court of this state on any ground whatever which can be removed during the term of the court to which the said writ of error is returnable; and said supreme court shall give such time during said term, even to the end of the same, as may be necessary to remove said ground, if it can be removed during the said term." Perhaps any certificate of the clerk as to the time of adjournment of the court is not strictly and technically a part of the record of each case, yet the time of adjournment, as registered on the minutes, is, in a broad sense, a part of the record of every case disposed of at the term; and in sending up transcripts it has been usual for the clerk to certify this matter, either in verifying the transcript or on the original bill of exceptions, and

this certificate, when properly made, is to be, or can be, regarded. See *Merritt v. Gill*, 59 Ga. 459. Whenever it does not otherwise appear when the court adjourned, or whether the bill of exceptions was or was not signed within 30 days thereafter, the clerk's certificate as to the time, duly made, will supply the defect; and consequently the absence of such a certificate from the transcript of the record is a defect which in this case can be removed, for several months of the term of this court still remain within which to have it regularly obtained and sent up, and we are satisfied, from the certificate of the clerk produced to us, that, were we to call by order for a like certificate to be added to the transcript of the record, it could and would be furnished. This ground of the motion to dismiss the writ of error is therefore one which can be removed within section 4272c, above quoted. The court, however, will not, without the consent of counsel for the defendant, consider this certificate, irregularly brought up, as a substitute for one hereafter to be obtained during the term, and under the regular order of this court.

3. The second ground of the motion to dismiss was that the bill of exceptions appears to have been altered. It was admitted that one of the alterations was made by defendant's counsel, or with his consent. Another alteration was made by erasing three lines and a part of the next, and writing over it some new matter. This alteration was made by the judge as he states in a note on the margin opposite the same, which note bears his signature. Another alteration, made in like manner upon the following page, occupies one line and a half, and the new matter is evidently in the handwriting of the judge; but no note of it is entered on the margin, or elsewhere. Counsel for the defendant declined to suggest or state in his place that any of the alterations were fraudulently made; and, on carefully inspecting the document, we see no reason to suspect that the second, as well as the first, was not made by the judge himself, at or before the time of signing the certificate. We think, therefore, it is to be presumed to be fair and honest. In *Cowart v. Page*, 59 Ga. 235, it was held that interlineations in bills of exceptions will be treated as made—nothing to the contrary appearing—before authentication. In that case, the judge having died, the bill was authenticated by affidavits. Some subsequent decisions tend to a more strict rule in regard to alterations, but none of them, as we think, restrain this court from deciding each case on its own merits, or from inspecting the bill of exceptions and determining from that and other evidence the *bona fides* and genuineness of the document as a whole. The case which comes nearest to the present one is

Alteration of
bill of excep-
tions.

Poppell v. Thigpen, 74 Ga. 412, the whole report of which is as follows: "Where a material part of the evidence set out in the bill of exceptions filed to the grant of a nonsuit is erased, without any note thereof, or statement that it was made by the judge or by counsel before signing, and where the only assignment of error in the bill of exceptions shows on its face that it was written over something which had first been written and then erased, without any identification by the judge, there being one other interlineation, which the judge certifies was made by him; the writ of error will be dismissed." There the assignment of error was written over something which had been erased. It does not appear in whose handwriting the new matter was. Had it been in that of the judge, the members of this court who then presided would doubtless have been satisfied of its *bona fides*. When there is no want of mental satisfaction by this court as to the genuineness or purity of the whole bill of exceptions, the writ of error ought not to be dismissed; but with such mental satisfaction to dismiss it would be illogical, for any interlineation or erasure on its face, or for the introduction of any matter thereby. In Clayton v. May, 68 Ga. 27, measures were taken to ascertain whether the alterations were made by the judge, and, the court being satisfied on the subject, and presuming that the judge made or ordered them, the case was retained. In Masland v. Kemp, 70 Ga. 786, the reference to certain necessary exhibits was obscurely interlined, and so blurred and blotted as to render it extremely difficult and uncertain, if not impossible, to make out the meaning of the reference. This was a part of the cause for dismissing the writ of error. In Davis v. Bennett, 72 Ga. 763, the obliteration broke the connection of sentences, destroyed the sense, and rendered it broken, if not altogether unintelligible. The writ of error was dismissed, but chiefly on another ground. In Cottle v. Harrold, *Id.* 831, it is said: "Material interlineations, additions, or erasures not made by the judge, or certified to have been made before the bill of exceptions was certified, will authorize this court to dismiss the case." But the writ of error was retained. In Johnson v. Johnson, 80 Ga. 260, the judge below merely certified in general terms that alterations were made by him before signing. The certificate did not specify any particular alterations. There being no suggestion of fraud, the motion to dismiss was denied. The foregoing are all the cases of alteration appearing in the bill of exceptions which have been ruled up to this time, so far as we know. Two cases of altered or substituted entries of filing have been decided. In the first (Darby v. Wesleyan Female College, 72 Ga. 212) the bill of exceptions had been filed, and was so marked by the

clerk before it was served. The outer leaf, upon which the entry of filing appeared, was removed and substituted by another, on which service was acknowledged and a new entry of filing written and signed. The first filing was treated here as the true one, and the writ of error was dismissed because the acknowledgment of service was obtained after that filing; the law at that time, as expounded by this court, requiring service to be made before filing. The next is *Wing v. Harris*, 75 Ga. 236. There the original entry of filing was scratched out, and after service the bill of exceptions was refiled. The writ of error was dismissed, for the reason, as appears from the opinion of the court, that no copy of the pure paper, with official entries thereon, was or could be served; but the service must have been something else than the original bill of exceptions, with the official entries thereon. On the whole, however it may be as to entries of filing, we conclude that there is no rule or decision which prevents this court from entertaining an altered bill of exceptions, when the members of the court are mentally satisfied that none of the alterations were made after the bill was signed and certified by the judge. If it comes to us precisely in the condition that it left him, it is the true, original bill of exceptions, and there is no reason why we should not entertain and treat it as such. This is putting a bill of exceptions on the footing upon which the general law (Code, § 2852) places private writings. *Thrasher v. Anderson*, 45 Ga. 538. Prior to the Code, in *Vickery v. Roe*, 26 Ga. 582, it was held that interlineations in an official certificate, made in the same ink and handwriting as the body of the document, would not vitiate, but that it would be presumed they were rightfully made. The first ground of the motion to dismiss the writ of error having been removed by the consent of counsel to dispense with any further certificate of the clerk as to the time of adjournment, and the second ground being insufficient, the motion is denied. For error in granting a nonsuit, judgment reversed.

Injuries to Employees—Apprehension of Danger.—Plaintiff was employed by defendant to nail number boards upon its bridges. A special train carried him to the bridges upon which the numbers were to be nailed. After he had nailed a board upon a bridge, the cars were moved forward whilst he was still upon it. He attempted to catch hold of the rail upon the top of a passenger coach, and was thrown to the ground and was injured. *Held*, that if there was no want of proper caution and care on the part of the person in charge of the train in moving it forward, and such movement did not in fact render plaintiff's position on the bridge one of peril, but plaintiff believed himself in danger, and in attempting to get upon the passenger coach he was actuated by terror or fright produced by apparent danger, and received his injuries while thus attempting to escape from a position not really dangerous but then appearing to him to be so, he was not entitled to recover unless the surrounding facts and circum-

stances were such as were reasonably calculated to produce such terror and fright in the mind of an ordinarily thoughtful and self-possessed man engaged in the same employment, and unless the means employed by him to escape the apparent danger were such as an ordinarily prudent man would use under like circumstances. *Austin & N. W. R. Co. v. Beatty*, Tex. Sup. Ct., April 30, 1889.

LOTHROP

v.

FITCHBURG R. CO.

(*Massachusetts Supreme Judicial Court, January 2, 1890.*)

Contributory Negligence—Coupling Cars Laden with Lumber.—A brakeman who, in shackling cars laden with lumber which projects over the ends, attempts to shackle them from the side upon which the lumber projects, is guilty of contributory negligence in so doing, when he might by stooping down or shackling the cars from the opposite side avoid injury, and there can be no recovery for his death under the Massachusetts statute giving a right of action for the death of an employe killed through the negligence of the employer when the employe was "in the exercise of due care and diligence at the time."

ON exceptions from Superior Court, Worcester County.

Action by Harry Lothrop against the Fitchburg R. Co. to recover damages for negligently causing the death of his father. The court directed a verdict for the defendant, and the plaintiff excepted.

A. Norcross, H. C. Hartwell and C. F. Baker for plaintiff.

George A. Torrey for defendant.

FIELD, J.—This is an action brought under St. 1887, chap. 270, § 2, by the next of kin of a brakeman employed by the defendant, who was killed while engaged in shackling two cars loaded with lumber, upon the defendant's railroad.

The first question is whether there was evidence for the jury that the brakeman was "in the exercise of due care and diligence at the time." Section 1, *Id.* He was about 22 years old, and had been employed as freight brakeman by the defendant from October 26, 1887, to the time of his death, which was on February 3, 1888. It was a part of his duty, as freight brakeman, to shackle and unshackle freight-cars. Certain sticks of lumber on two open flat freight-cars standing on the defendant's track, about six feet apart, projected over the opposite ends of the cars. The engineer, in making up the train, backed it, with one of these

Facts.

cars attached at the rear, until this car came in contact with the other, to which it was to be shackled; and in making the shackle, the head of the brakeman was caught between the ends of two projecting timbers, and he was instantly killed. This happened about noon, on a clear day. "The deceased made this shackling from the north side of the track, which was the side on which he was working, and from which he had made the other shacklings on this train. Upon the south side of said cars the lumber did not project, and there was nothing to prevent the deceased from crossing over, and making the shackling on that side." He was acting under the general orders of the conductor of the train to do the shackling on the cars standing on this track; but the conductor "gave him no special directions to make the particular shackle which caused the injury complained of, but such cars were a part of the cars standing on said track, and it was the duty of the deceased to do this particular shackle, under the aforesaid general orders of the conductor." The plaintiff's counsel admitted, at the request of the defendant, "that lumber and rails are frequently transported over railroads, with ends "projecting beyond the cars, but such is a dangerous way of loading, and that in such cases shackling must be and is made by the brakeman's stooping down below the projecting timbers or rails. The deceased brakeman might have safely shackled these cars in that way."

The general rule of law is that when the danger is obvious, and it is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by anyone else, and when the servant has as good an opportunity as the master, or anyone else, of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. *Williams v. Churchill*, 137 Mass. 243; *Moulton v. Gage*, 138 Mass. 390; *Leary v. Boston & A. R. Co.*, 139 Mass. 580, 23 Am. & Eng. R. Cas. 383; *Russell v. Tillotson*, 140 Mass. 201; *Haley v. Case* 142 Mass. 316; *Linch v. Sagamore Manuf'g Co.*, 143 Mass. 206; *Ciriack v. Merchant's Woolen Co.*, 146 Mass. 182; *Scanlon v. Boston & A. R. Co.*, 147 Mass. 484, 38 Am. & Eng. R. Cas. 48; *Wood v. Locke*, 147 Mass. 604; *Dunlap v. Barney, Manuf'g Co.*, 148 Mass. 51; *Crowley v. Pacific Mills*, 148 Mass. 228; *Probert v. Phipps*, 149 Mass. 258. This rule is specially applicable when the danger does not arise from the defective condition of the permanent ways, works, or machinery of the master, but from the manner in which these are used, and

Assumption
of risk by
employee.

when the existence of the danger could not well be anticipated, but must be ascertained by observation at the time. We are of opinion that this case falls within this rule.

The nature of the danger was such that a brakeman accustomed to shackle freight-cars must have understood it. It was obvious, and he was more likely to know exactly what it was, and how it was to be avoided, than anyone else. He was permitted to do the shackling from either side of the track, and in any manner he chose. It cannot be considered as necessarily negligent for a railroad company to transport lumber in the manner shown in this case. The utmost that can be urged is that the company should have given notice to a brakeman when cars are loaded in this manner; but this cannot be necessary when it is broad daylight, and the thing speaks for itself. *Hathaway v. Michigan Cent. R. Co.*, 51 Mich. 253, 2 Am. & Eng. R. Cas. 249; *Northern Cent. R. Co. v. Husson*, 101 Pa. St. 1, 12 Am. & Eng. R. Cas. 241; *Louisville & N. R. Co. v. Gower*, 1 Pickle (Tenn.), 465, 31 Am. & Eng. R. Cas. 168; *Scott v. Oregon R. & N. Co.*, 14 Or. 211, 28 Am. & Eng. R. Cas. 414; *Day v. Toledo, C. S. & D. R. Co.*, 42 Mich. 523, 2 Am. & Eng. R. Cas. 126. See *Walsh v. Whitely*, L. R. 21 Q. B. Div. 371; *Yarmouth v. France*, L. R. 19 Q. B. Div. 647; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685.

Deceased guilty of contributory negligence.

It is unnecessary to consider whether the facts stated tended to prove a case within the statute if the deceased had been in the exercise of due care. Exceptions overruled.

Injuries to Employees while Coupling Cars with Projecting Loads.—See *Brice v. Louisville & N. R. Co. (Ky.)*, 38 Am. & Eng. R. Cas. 38; *Haugh v. Chicago, R. I. & P. R. Co. (Iowa)*, 31 *Id.* 173; *Louisville & N. R. Co. v. Gower (Tenn.)*, 31 *Id.* 168; *Louisville & N. R. Co. v. Brice (Ky.)*, 28 *Id.* 542; *Scott v. Oregon R. & Nav. Co. (Ore.)*, 28 *Id.* 414; *Brown v. Atchison, T. & S. F. R. Co. (Kan.)*, 15 *Id.* 271; *Northern Cent. R. Co. v. Husson (Pa.)*, 12 *Id.* 241; *Atchison, T. & S. F. R. Co. v. Plunkett (Kan.)*, 2 *Id.* 127; *Day v. Toledo, C. S. & D. R. Co. (Mich.)*, 2 *Id.* 126.

Coupling—Contributory Negligence—Projecting Load.—Plaintiff's intestate was conductor of a switching crew in defendant's yard, having charge of all the movements of cars within or about the yard. While acting as such, and attempting to couple two cars in the usual course of business, his head was struck by a projecting piece of timber upon a moving car, and he was killed. The cars were loaded and handled in the usual way. Plaintiff's intestate was experienced in his business, and knew the usages of the yard. *Held*, that plaintiff assumed the risk of accident as incident to his employment, and that he could not recover. *Boyle v. New York & N. E. R. Co.*, Mass. Sup. Jud. Ct., Feb. 26, 1890.

Same—Instructions—Negligence of Engineer and Fireman.—Plaintiff sought to recover damages for injuries sustained in uncoupling a locomotive. He alleged that those in charge of the engine failed to obey his signals after he had gone between the locomotive and the car. *Held*, that an instruction

that negligence on the defendant's part was not proved, except the evidence showed that the speed of the train was increased after plaintiff went between the car and the engine, or that those in charge of the engine knew that plaintiff had gone there and failed to stop upon receiving his signal, was properly refused, the fact that the failure of the engineer and fireman to know that the plaintiff had gone between the engine and car may itself have been negligence being ignored. *Held*, also, that an instruction that if the engineer and fireman, or either of them were aware of plaintiff's perilous condition and heard his call, but failed to stop the engine by reason of which plaintiff was injured, they were guilty of negligence when there was evidence that they used every available means to stop the engine, should not have been given, as it released the defendant from liability if the fireman and engineer had not been previously negligent. *Neville v. Chicago & N. W. R. Co.*, Iowa Sup. Ct., Jan. 31, 1890.

Same—Use of Freight Engine instead of Switch Engine.—In an action for damages for negligently causing the death of plaintiff's husband while engaged in coupling a car, if it appears that the coupling was made by an ordinary freight engine, and not by a switch engine, evidence that signals can be better seen from switch engines, and that they are more easily handled, is admissible. *Missouri Pac. R. Co. v. Lamothe*, Tex. Sup. Ct., Feb. 14, 1890.

Same—Contributory Negligence—Assuming Dangerous Position.—Plaintiff was employed as a "wiper" at one of defendant's roundhouses. It was part of his duty to go with the dispatcher or "hostler" when the latter, acting as an engineer, ran the locomotives to and from the roundhouse to the main track, where the regular engineer customarily assumed or surrendered control. When with the dispatcher upon the locomotive, it was plaintiff's duty to aid in putting in water and fuel, to open and close switches, and occasionally to couple the locomotive to cars which might have to be moved a short distance. No instructions had been given to the plaintiff as to the manner of coupling cars, nor had he been informed of any rules which required the use of signals by the use of the bell or otherwise, except that he had observed that it was the usual practice for the engineer to receive a signal from the person who was making the coupling, and that on one occasion he had been told by the dispatcher that he dared not move the engine before ringing the bell. On the day of the accident, plaintiff by the dispatcher's orders, stepped to the end of some cars that he might couple them to the locomotive. Finding the pin fast in the draw-head of the car he stepped to the tender of the locomotive, obtained another pin, returned to the car, and while attempting to drive the fastened pin out of the draw-head, was struck by the locomotive. The locomotive had been stopped about 10 feet from the cars, and it was moved back upon him by the dispatcher without any warning whatever. *Held*, that the testimony was not sufficient to show the plaintiff to have been guilty of contributory negligence. *Rehman v. Minneapolis & N. W. R. Co.*, Minn. Sup. Ct., Feb. 18, 1890.

Contributory Negligence—Car Repairer—Assuming Dangerous Position—"Kicking."—It appeared that plaintiff's intestate, a car repairer, had long been familiar with the manner in which cars had been removed at the place where he received his injury. He knew that a newly loaded car was liable to be "kicked" up against the other cars and thus to push them forward. While engaged in repairing a car with three or four cars standing behind him, an interval being left open at his request, a newly loaded car was kicked behind him with sufficient force to drive them across the interval and upon deceased, killing him instantly. *Held*, that if under these circumstances he voluntarily went to work in the space between the cars, giving no notice that he was there, he was guilty of contributory negli-

gence in putting himself in a position of danger, and that if on the other hand, he requested the conductor to leave the space open, and such request is to be taken as notice of his being between the cars, then the omission to heed this notice and the "kicking" of the car while he was there, were negligence on the part of his fellow-servants for which the defendant was not liable. *Whitmore v. Boston & M. R. Co.*, Mass. Sup. Jud. Ct., Jan. 2, 1890.

LE MAY

v.

CANADIAN PACIFIC R. CO.

(18 Ont. Rep. 314.)

Master and Servant—Unpacked Frog—"Person Injured" thereby—Construction of Statute.—Section 262, sub-sec. 3, of 51 Vic., chap. 29 (D.) provides that "the spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch, where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of the rail," and sect. 289 of the same Act provides that "every company, * * * causing or permitting to be done, any matter, act or thing contrary to the provisions of this Act or the special Act * * * or omitting to do any matter, act or thing required to be done on the part of any such company, * * * is liable to any person injured thereby for the full amount of damages sustained by such act or omission," etc. The plaintiff, who had been for some months employed at the place where the accident happened, as a switch foreman, while in the course of his duty in the act of uncoupling cars, had his foot caught in an unpacked frog, where it was crushed by the wheels of the cars. *Held*, that, although a servant of the defendants, he was a "person injured" within the meaning of the statute, and entitled to maintain an action for negligence.

Same—Notice—Assumption of Risk.—The jury, having found that the frog was not packed, in reply to a question whether the plaintiff had "notice or knowledge or ought he to have had notice or knowledge that the frog was not packed," answered: "We believe he did not have notice, and should have had notice," and in answer to another question they negatived contributory negligence on the plaintiff's part. *Held*, even assuming that the meaning of the answer was to impute notice of the danger to the plaintiff, it would not prevent his recovering so long as he himself was not negligent, there being no finding or evidence to sustain a finding that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.

ACTION by John W. Le May against the Canadian Pacific R. Co. for negligence in not having a certain space at a frog in the railway track filled with packing, by reason of which his foot was caught in the unpacked frog, and was run over and crushed by the wheels of a railway car. The facts are fully set out in the judgment of the divisional court. Five questions were submitted to the jury, four of which, with the answers are set out in the judgment of FERGUSON, J., and the fifth was as to the amount of damages, if any, which were found at \$2,500.

The judge reserved judgment on the findings until after argument, and then rendered the following opinion:—FALCONBRIDGE, J.—Mr. Shepley's able and ingenious argument merits more consideration and more elaborate treatment than I am able to give it in view of the limited time at my disposal. It is of the last importance that the parties should be able, if they so desire it, to move against this judgment at the next sittings of the divisional court. With much doubt and hesitation, I refuse to give effect to his contention that the effect of § 289 of 51 Vic., chap. 29, (D.) is merely to declare the want of packing to be an act of negligence and disregard of duty on the part of the defendants, and that a servant must otherwise bring himself within the rules of the common law before he can recover. If I am right in this, it is not necessary to decide whether the knowledge of a section foreman is notice to the company. I enter judgment for the plaintiff with full costs.

From this judgment the defendants appealed to the divisional court.

Shepley for the appeal.

Delamere and *Frank Keefer*, *contra*.

BOYD C.—Le May now aged twenty-five years, went into the service of the Canadian Pacific Railway in December, 1887, and was promoted to the position of switch foreman in July, 1888. On 22 May, 1888, the Railway Act, 51 Vic. chap. 29 (D.) was passed, which provided for the packing of railway frogs. On 6th August the side track was constructed near Port Arthur, on which the accident occurred on 20th October, whereby the plaintiff lost his foot by reason of the omission of the defendants to comply with the statute in this particular. Sec. 262 gives directions for packing frogs; and sec. 289 provides that the company which omits to do anything required to be done by the company (*i. e.*, by that statute) is liable to the person injured thereby for the full amount of damages sustained by such omission. The plaintiff's action is founded on a statutory breach of duty on the part of the defendants, by which he has been maimed for life.

It was argued that he was not, being a servant of the company, within the meaning of the statute. To that may be answered the plain meaning of the words which extend to "any person injured." Borrowing the language of Locke, "We must consider what person stands for, which I think is a thinking, intelligent being. It is ordinary knowledge, which even judges must not forget in the presence of a statute, that of all persons in the community those most exposed to

"Any person" injured
—construction
of
phrase.

to danger from the fatal frog, are the track and switchmen of the railway. To leave these men out of the benefit of the act, would be to minimise its scope and violate one of the main canons of interpretation laid down by the legislature, whereby all acts are deemed remedial and to be liberally construed; R. S. C. chap. 1, sec. 7, sub-sec. 56.

It is next urged that the answer made by the jury to the first question left to them, disentitles the plaintiff to recover. This question was, "Did the plaintiff before the happening of the accident, have notice or knowledge, or ought he to have had notice or knowledge that the frog was not packed? Answer—We believe he did not have notice, and should have had notice." The defendants' counsel says this means he is to be affected with notice of the state of the frog, because of his employment and his observation of the place. I should take the very opposite meaning out of the words—namely, that no notice was given to him of the frog being unpacked, and that notice should have been given to him. That is also in harmony with the answer of the jury to the fourth question, that he was not guilty of contributory negligence. But assume that it means that notice of the danger is to be imputed to him, that would not prevent his recovering so long as he was not himself negligent. As expressed by Lord Justice BOWEN in *Thomas v. Quartermain*, 18 Q. B. D., at p. 697; "The plaintiff's knowledge of the danger is not conclusive. Obviously, such knowledge may have even led him to exercise extraordinary care."

**Finding of
Jury—Notice
of condition
of frog.**

The hope of the defendants based on this apparently ambiguous finding is dissipated by the holding of WILLS, J., in *Osborne v. London and N. W. R. Co.*, L. R., 21 Q. B. D. 220, 223; 35 Am. & Eng. R. Cas. 483. He said, "Where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found, * * if the defendants desire to succeed on the ground that the maxim *volenti non fit injuria*, is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." There is here no evidence which would warrant such a finding.

The last defence urged is the standing one of contributory negligence. But this was left fully and fairly to the jury, and they have disposed of it adversely to the company, and it cannot be said that there is not sufficient evidence to support their disposition of this defence. While under orders from the company to take charge of cars loaded with various freight so as to place them

**Contributory
negligence.**

at their proper places for unloading, he had to detach or uncouple some of these loaded cars. He found the pin to be stiff and could not pull it out from the side of the car, and so stepped in with one foot between the cars to get a better pull, and while working at the pin, his foot went into the frog and was caught. The cars were moving backwards slowly, inch by inch, as it were, and in spite of his efforts to get free, they shoved him forward, and one wheel went over his foot. He was familiar with the manner of uncoupling cars and acted on this occasion in the usual way. He knew there was a frog at the place in question, but did not know whether it was filled or not. The plaintiff says the company expect men to uncouple cars while they are on the move, under pain of being discharged if they do not adopt this plan. The company knew of how the work of coupling was usually and generally done, and should have been solicitous to lessen the danger as much as possible by observing the directions of the statute. The plaintiff was a competent person to do this work, and as the car was moving so very slowly he felt himself evidently master of the situation, and would have been so but for the defendant's neglect to make the frog perfectly safe. This omission of duty on the defendant's part, appears to me to have given rise to the accident, and to have been its immediate cause, and I find no good reason for disturbing the verdict and judgment in the plaintiff's favor.

FERGUSON, J.—The plaintiff was a switchman in the employment of the defendants. It is alleged that the accident which gave rise to the action occurred by reason of the negligence of the defendants in not having a certain space at a frog in their railway track filled with packing as required by the Railway Act, 51 Vic. chap. 29 (D). It is not now asserted that this space was packed as required, or at all. The fact is undisputed that it was not packed. The plaintiff sustained the injury complained of while in the performance of his duty as such employe of the defendants, and at this place he had his foot cut off or partly cut off by a wheel of one of the defendant's cars, and the jury have awarded him \$2,500 damages.

The 3rd sub-section of section 262 of the Act provides that the space behind and in front of every railroad frog or crossing, and between the fixed rails of every switch where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of the rail. The 289th section of the same Act provides that "every company * * causing or permitting to be done, any matter, act, or thing contrary to the

Provisions of
statute.

provisions of the Act or the special Act, * * or omitting to do any matter, act, or thing required to be done on the part of any such company, * * is liable to any person injured thereby for the full amount of damages sustained by such act or omission," etc. The plaintiff had been for some months employed at the place where the accident happened, and had had charge of a gang of men there.

Several questions were submitted to the jury, which were as follows:—1st. Did the plaintiff before the happening of the accident, have notice or knowledge, or ought he to have had notice or knowledge, that the frog was not packed? The answer of the jury is: "We believe he did not have notice, and should have had notice." 2nd. Did the accident happen to the plaintiff by reason of the frog not being packed in accordance with the statute? The answer is: "We believe that it did." 3rd. Did the plaintiff receive the injuries while in the discharge of his duties, as a servant of the defendants, and in consequence of the discharge by him of such duties? The answer is: "We believe he received the injuries in the discharge of his duties, and in consequence of them." 4th. Was the plaintiff guilty of contributory negligence? The answer is: "We do not believe that he was."

Questions
submitted to
jury.

It was contended that the words, "Any person injured thereby" in the 289th section aforesaid, do not apply to or comprehend an employe or servant of the railway company; but I cannot perceive any good ground for this contention, and I agree in the reasoning and conclusion of the chancellor in his judgment in regard to this element of the case.

"Any person
injured."

There was much contention at the bar respecting the meaning of the answer to the first question, that is: whether the jury meant by the latter part of it, "and should have had notice," that the plaintiff should have been notified by the defendants that the space in question was not packed; or that the plaintiff having been for some considerable time engaged or employed in the performance of his duties as the defendants' servant at the place, should have himself known that the space in question was not packed as required. I do not see that it matters so much so far as the result of the case is concerned, which of these readings is given to this answer of the jury; for, let it be assumed that the one least favorable to the plaintiff is adopted, then I apprehend notice that the space was not packed as required will be imputed to the plaintiff. The second finding is that the accident occurred by reason of the space not being packed; and there is no doubt that this finding is well supported by the evidence.

Notice of con-
dition of frog.

The fourth finding is, that the plaintiff was not guilty of contributory negligence. As appears by the opinions of all the judges in the case, *Thomas v. Quartermain*, 18 Q. B. D. 685, this notice imputed to the plaintiff (or even actual knowledge of the fact if such had been the case), is not conclusive against the plaintiff on the question of contributory negligence. In that case the learned judges were not all of the same opinion, but upon this particular point they seem to agree. The case was under the provisions of a statute different from the act relied on in the present case; nevertheless, the discussion and the authorities referred to upon this particular branch or subject are in point here. Several cases are referred to in the judgments, and so far as I am able to perceive from these, from the opinions of the learned judges, and from some other cases, it is not unsafe to state the law upon the point as laid down in the case of *Clarke v. Holmes*, 7 H. & N. 937, namely, that knowledge is only a fact in the case to be taken into consideration by the jury, with all the other facts and circumstances, in determining the question whether the plaintiff had himself helped to bring about the accident, in respect of which he seeks to charge the defendants.

The jury knew what they intended by the part of their answer—that is, the answer to the first question; and if they meant, as I have assumed, against the plaintiff, that by reason of his employment at the place, and being so long engaged there, he ought to have known what the fact really was; they must have taken this into account when they were considering what their finding should be on the issue regarding contributory negligence, and their finding upon this issue, I think, cannot be disturbed here. I agree with the chancellor in his way of looking at the evidence relating to this issue, and I think there is certainly evidence on which a jury might reasonably find, as the jury have found upon this issue, and such being the case, we cannot, according to the latest authorities on the subject, disturb the finding.

Then there being a statutory duty resting upon the defendants to have the space in question filled or packed, the accident having occurred by reason of this duty having been neglected—see the second finding—the plaintiff being a person within the meaning of the words “any person injured thereby” in the 289th section, and not being guilty of contributory negligence, I do not see that his case at the present time would be any better or stronger if the other reading were given to the latter part of the answer to the first question—namely, that he should have been notified by the defendants, and I do not see how we are to disturb the verdict the plaintiff has obtained.

It was contended, as I understood the argument, that the plaintiff had voluntarily undertaken the whole risk at the time and place of the accident, and that his case fell under the maxim *volenti non fit injuria*, counsel seeking to separate this means of defense from the issue raised upon the question of contributory negligence, as was apparently done in *Thomas v. Quartermain*, 18 Q. B. D. 685. This was not set up in the pleadings as a defense, although contributory negligence is set up.

Pleading—
Volenti non
fit injuria.

Under the former law of pleading, it was not necessary that a defendant should set up contributory negligence, or perhaps the other, if he chose to rely upon it. The whole would be involved probably in the issue raised upon the plea "not guilty," for the plaintiff, there being only that plea upon the record, would have to make out that the injury occurred to him by reason of the negligence of the defendants; or to put it otherwise, that the negligence of the defendants was the proximate cause of the injury of which he complained; and if on the evidence it appeared that he himself had partly or wholly caused the injury, he could not succeed unless in case, where, notwithstanding some neglect by the plaintiff, the defendants might, by the exercise of reasonable care, have avoided the accident, as in the case of *Tuff v. Warman*, 21 C. B., N. S. 740, and many subsequent cases. But under the present law of pleading, the parties are to state the facts upon which they respectively rely; and it may be questioned, when the defendants seek to separate this as a defense from contributory negligence, which they have set up, whether they are at liberty to do so without a pleading on the subject.

Apart, altogether, however, from any question of pleading, it appears to me that the defendants cannot and do not make out their contention in this respect. Whether or not the plaintiff did voluntarily undertake the whole risk is a question of fact. It is to be borne in mind that the jury have found that the plaintiff did not in fact know that the space or frog in question was not packed; and the most that can be said against the plaintiff on the finding upon this immediate question is, that notice of the fact should be imputed to him.

The question as to the kind of knowledge of the danger necessary to found this defense, is referred to and discussed in the case of *Thomas v. Quartermain*, 18 Q. B. D. 685, the learned judges employing various forms of words in so doing, but I see nothing in that case or in any other authority to lead to the opinion or conclusion that the risk can be voluntarily undertaken or encountered by one who does not at the time, in fact, know of the danger. It is laid down, as

I understand it, that the knowledge on the part of the plaintiff, which will prevent him from alleging negligence against a defendant, must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred or encountered by him; and I am wholly unable to see how this can be the case where there is only imputed knowledge, if even so much as this, and not knowledge in fact of the danger.

In addition to what I have said, I agree with the view of the evidence taken by the chancellor bearing upon this element of this case; and I am of the opinion that it has not been shown that there is in fact ground for this defense; and besides it was not left to the jury, and there is no finding upon the subject. I do not know that anything was urged against the amount of damages awarded by the jury, and I am of the opinion that the verdict and the judgment entered thereon should be sustained.

Injuries to Employees—Construction of Statutes—"Any Person."—A statute which gives a right of action against a railroad company "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant or employee, whilst running, conducting, or managing any locomotive, car, or train of cars," does not give a right of action for death happening through the negligence of a fellow-servant, if the master has not been negligent in employing unskillful or improper servants. The court in this case declared that the legislature did not intend to include under the term "any person" a fellow-servant injured by the negligence of a co-employee without any fault of the master. *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112, overruling *Schultz v. Pacific R. Co.*, 36 Mo. 13. See also *Connor v. Chicago, R. I. & P. R. Co.*, 59 Mo. 185. A similar decision was rendered by the supreme judicial court of Maine in *Carle v. Bangor & P. R. & C. Co.*, 43 Me. 269, the court deeming the purpose of the statute in that case to be to fix and establish the rights and obligations of railroad companies as between themselves and third persons, not their servants. In *Sullivan v. Mississippi & M. R. Co.*, 11 Iowa 421, a statute entitled "An act granting to railroad companies the right of way," which provided that "every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of this act, or of any other neglect of any of their agents, or by any mismanagement of their engineers, by the persons sustaining such damages" was construed not to extend the liability of the employer to cases where the injury was caused by the negligence of a co-employee.

Construction of Statute—Right of Employee to Recover—"Any Person."—A statute of Missouri provides that "whenever any person shall die from any injury resulting from or occasioned by the negligence * * * of any servant or employee, while running, conducting or managing any locomotive, car or train of cars," etc., and a subsequent clause provides that "when any passenger shall die from injury resulting from or occasioned by any defect or insufficiency in any railroad or machinery thereof." *Held*, that the provision of the first clause conferred a right of action upon employees injured by the negligence of those in charge of the train so long as such persons were not fellow-servants. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo.

113. BLACK, J., said:—"The further point is made that, this being an action by the representative of an employe, the court erred in fixing the damages at \$5,000. In other words, the contention is that the case is not within the second section of the damage act. The case of *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112, decides, and decides only, that the words 'any person' do not include the case of a servant whose death is occasioned by the negligence of a fellow-servant. Considering the second, third and fourth sections together, it was held that it was not the object, purpose, or intent of the legislature to destroy or interfere with the rule that prohibits a servant from sustaining an action against the master for the negligence of a fellow-servant. 'The master himself not being in fault,' says the court, 'the face of the section is at war with any other idea than that the right to sue was intended to be a transmitted right, and not an original right.' That case has been followed to the present time, and we still adhere to the ruling there made. But if we are right in the conclusion that Sullivan was not a fellow-servant with the servants of the defendant, running the train which ran over and killed him, then the *Proctor Case* is without any application here. The statute reads: 'Whenever any person shall die from any injury resulting from or occasioned by the negligence * * * of any servant or employe, while running, conducting, or managing any locomotive, car, or train of cars,' etc.; and a subsequent clause goes on to say: 'And when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or machinery thereof,' etc. It will be seen that, in case of death resulting from defective road or machinery, this section extends to passengers only, and not to servants, though they may have a cause of action under the third section, but not even under that section, if the death be the result of the negligence of a fellow-servant. But the first clause of the second section is not limited to passengers. Under that clause, if the person die from the negligence of the servant, while running any locomotive, car, or train of cars, then his representatives will be entitled to recover \$5,000 damages; provided the person would have had a cause of action had death not followed. Sullivan, therefore, not being a fellow-servant with the train men, the plaintiff's cause of action comes within the said second section of the damage act."

LAKE SHORE & MICHIGAN SOUTHERN R. CO.

v.

PARKER.

(*Illinois Supreme Court, January 21, 1890.*)

Contributory Negligence—Excessive Speed—View of Switch Obscured.—Where an engineer operating a train which was behind time, approached a switch at the usual speed of 14 to 18 miles an hour with his engine under control, while his view was obstructed by smoke so that he could not see the switch target, the question whether he was guilty of contributory negligence precluding a recovery for his death, is one of fact for the jury.

Same—Violation of Rules—Province of Jury.—Rules requiring the engineer when his view is obstructed to control his train so as to be able to stop within the range of his vision; to run delayed trains with great caution and at all times under full control; to approach stations with reduced speed and with care, simply call attention specifically to the exercise of that care

which the law imposes upon every engineer, and the question whether an engineer who approached a switch, his view of which was obscured, at a speed of 14 miles, was guilty of a violation of the rules, is one of fact for the jury.

Same—Limit of Speed Prescribed by Ordinance—Cause of Injury.—Although the train was running at a speed exceeding the limit established by municipal ordinance, and the engineer was therefore guilty of negligence *per se*, the engineer or his representatives are entitled to recover if the excessive speed did not contribute to the injury.

Same—Consideration of Engineer's Conduct—Instructions.—An instruction that in determining whether an engineer "at the time of the accident made use of all the care, exertion and skill" expected of a locomotive engineer, the jury may take into consideration, etc., is not open to the objection that it confines the attention of the jury to the moment of the occurrence of the accident, and excludes from its consideration negligence of the conductor or engineer leading up to, or causing the accident.

Damages—Instruction—Statutory Limit.—An instruction that if the jury find for the plaintiff "they may assess the plaintiff's damages at such sum as will be a fair compensation with reference to pecuniary injuries resulting from such death to the widow and next of kin to the deceased, not exceeding the sum of \$5,000," is not open to the objection that it authorizes a recovery of the sum of \$5,000 whether the pecuniary loss of the plaintiff equals that amount or not.

Contributory Negligence—Duty of Engineer—Speed of Train.—An instruction that the deceased was under the obligation to run his train so as to be absolutely able to stop it in time to avoid a collision on a side track in case the switch should have been left open, is properly refused.

APPEAL from Appellate Court, First District.

Pliny B. Smith for appellant.

John McGaffey and *John T. Richards* for appellee.

WILKIN, J.—This is an action on the case, brought by appellee against appellant, for negligently causing the death of her husband, John C. Parker. There are two counts in the declaration, both in the usual form, except that the second fails to allege that the deceased left surviving him next of kin. The negligent act by which death was caused is in both counts charged to be leaving a certain switch open, whereby the engine, then driven by deceased, was diverted from its track, and caused to collide with another engine on a side track. A trial in the circuit court of Cook county, the Honorable FRANK BAKER, J., presiding, resulted in a verdict and judgment for appellee for the sum of \$5,000, and costs of suit. On appeal to the appellate court of the first district, that judgment was affirmed, and appellant now prosecutes this further appeal.

It appears that at the time of his death deceased was employed as a locomotive engineer on the railway of the Chicago, Rock Island & Pacific Railway Company. Running into the city of Chicago from the switch between Englewood and the city depot, a distance of some six miles, this

company and appellant used the same main tracks, along which, at frequent intervals, were switches under the exclusive control of appellant. These were supplied with targets, which served as signals to indicate whether the switch was open or closed. One of these switches was at Forty-Fourth street, at which place appellant maintained extensive yards on either side of the main track. This switch was on the west side of the west track, and, when open, would divert a train from the east main track to a side track in the east yard. On the 7th of November, 1883, as Parker, in charge of a locomotive attached to a train of passenger cars, approached this switch from the south, he discovered that it was open, but too late to stop his train before being thrown on the side track, and in collision with a locomotive and train belonging to appellant, thereby causing his death.

The theory of appellee's case is that the employes of appellant had negligently left the switch open, and in a condition dangerous to trains approaching from the south; that deceased was in the exercise of reasonable care as he approached the same, and therefore appellant is liable. The first of these positions is not controverted by appellant. The second is strenuously denied, and upon its determination the result of the case rests. It presents a controverted issue of fact, and the finding of the jury, affirmed by the judgment of the appellate court, is conclusive against appellant's contention, and cannot be retried in this court. Appellant seeks to avoid this result upon the theory that there is no evidence tending to support that finding, but, on the contrary, the undisputed facts show that deceased was himself guilty of gross negligence contributing to his death, and therefore the question of his negligence becomes one of law, and not of fact.

The conclusion is not warranted by the evidence. It shows that deceased approached the switch at the "usual speed," and that he was at his proper place on the engine, and had it under control; that he remained at his post to the last moment. In short, the evidence at least tends to show that he did everything which it was his duty to do under the circumstances, unless it can be said that the rate of speed at which he approached the switch should be held conclusive proof of negligence; or, as is argued by counsel, that, whether he could see the switch target or not, he was bound to know its position, and so regulate the speed of his train as to be able to stop it before running into the open switch, and, if he did not, he was guilty of negligence as a matter of law. The testimony of the fireman shows that for some distance south of the switch the target was so obscured by smoke and steam from an engine

Contributory
negligence—
Rate of speed.

on a side track near by that it could not be seen from the cab of Parker's engine. To say that, notwithstanding this fact, the deceased was bound to assume, or even suspect, that the switch might be open, and stop his train, or put it so under control that he could stop it before reaching the switch, and that a failure to do so is conclusive proof of negligence, seems so unreasonable as to refute itself. In such case Parker would certainly have the right to suppose that others had done their duty by closing the switch. Little progress could be made by trains if any other rule should be adopted. *Chicago & N. W. R. Co. v. Snyder*, 117 Ill. 376, 28 Am. & Eng. R. Cas. 611, is supposed to support appellant's position. It was not claimed in that case that Snyder, the deceased, could not, or that he did not, see the signal. The contention by his administrator was that the signal was given for him to pass the crossing, which he was attempting to obey, when the signal changed, but too late for him to stop his train and avoid the collision. On the other hand, it was insisted that the signal was not given for him to cross, but for the train with which he collided. The instruction referred to by counsel, and which we held should have been given, simply announced that, if the jury found from the evidence that the signal was for the train with which Snyder collided, and not for him, his administrator could not recover. In *Lombard v. Chicago R. R. Co.*, 47 Iowa 497, it is expressly stated that the signal was seen, and so in the other cases cited it was seen, or could have been seen by looking.

It was unquestionably the duty of the deceased, taking into consideration all the facts and circumstances, obscurity of the vision, with others, to approach the switch with care. He was not bound to suppose or suspect that defendant's servants had been guilty of a reckless omission of duty in leaving it open. Whether he used due care to observe the target, and, in approaching, the train, was therefore clearly a question of fact. The jury found that, as the train in charge of deceased approached the switch, it was running between 14 and 18 miles an hour. This, it is said, under the circumstances and rules of the two companies offered in evidence, was gross negligence on the part of deceased, and absolutely precludes a recovery by his administrator. It is not pretended that this rate of speed is ordinarily dangerous, but the contention is that, the view of the target of the switch being obscured, the train being behind time, the fact that a switch was known to be at that place, and that it was near a station, made it imperative upon deceased, under the rules of his own and the defendant company, to run at a less rate of speed. Such of the rules referred to as are ma-

**Rules of com-
pany.**

terial for the consideration of this point are: (1) "When the view is from any cause obscured, engineers and conductors must control their trains or engines so as to be able to stop within the range of their vision." (2) Delayed trains between Englewood and Chicago must run with great caution, and at all times under full control. (3) "That all trains must approach stations with reduced speed and care." (4) That in approaching switches the greatest care must be taken.

It will be seen that no one of these rules commands the doing or not doing a particular act or acts. They each impose upon the engineer duties calling for the exercise of judgment, skill, and diligence. In other words, they simply call attention specifically to the exercise of that care which the law imposes upon every engineer. Therefore, whether running a train 14 miles an hour was a violation of these rules is as much a question of fact as would have been the question, was deceased guilty of negligence, had there been no rules? *Galena & C. N. R. Co. v. Dill*, 22 Ill. 264; *Burkett v. Bond*, 12 Ill. 87; *Toledo P. & W. R. Co. v. Foster*, 43 Ill. 415. Negligence is not a legal question, but one of fact. *Great Western R. Co. v. Haworth*, 39 Ill. 353; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 455; *Pennsylvania Co. v. Conlan*, 101 Ill. 106. We need scarcely suggest that these rules cannot have the effect given to those in cases cited by appellant; as where one takes a seat upon a locomotive, or steps on the foot-board of an engine in motion, or attempts to couple cars while in motion, or to make a coupling by hand instead of using a stick, in each of which cases the rules of the company prohibited the doing of the act. If in this case the rules had limited the rate of the speed of trains to less than 14 miles an hour when the view was obscured, or on approaching switches, or when trains were behind time, the cases cited would have been in point, but, in the absence of such a regulation, they have no bearing upon this case. We are not to be understood as holding that it was not the duty of deceased to exercise a high degree of care and skill in the observance of these rules, and in the use of all other reasonable precautions to avoid the accident, or that his failure to do so would not constitute such negligence as would defeat a recovery. The law does not, however, in such case, require infallibility. It is a question, after all, of due care, under the facts and circumstances surrounding the party. It will not do to lose sight of all other duties and responsibilities imposed upon an engineer when we are considering whether or not he has used reasonable care in regulating the speed of his train to avoid an accident which he could not foresee. It was Parker's duty to get his train to the Chicago depot. He was not allowed unlimited

time to do so. It was his duty to keep out of the way of other trains, and he owed many other duties to his company and the passengers in his charge which he could not ignore. It may be that the jury should have found from the facts proved that Parker was guilty of negligence contributing to the collision which caused his death. That was a question for the trial court, and, finally, for the appellate court. With it we have nothing to do.

Appellant also offered in evidence an ordinance of the town of Lake, through which the train in question was running when the accident occurred, prohibiting passing trains from running at a greater rate of speed than 12 miles an hour. Counsel say the accident was the result of the violation of this ordinance, and therefore, as a matter of law, there can be no recovery. If the premise was correct, the conclusion would be inevitable; but who is to determine the fact as to what caused the accident? It is remarkable that throughout the argument of this case on behalf of appellant the open switch is lost sight of entirely. That was the fatal cause of Parker's death. The only question is, did his conduct so far contribute to the accident as to bar recovery? While it is true that the omission of a duty imposed by positive law is negligence *per se*, yet such negligence becomes actionable, as a rule, only when it causes or contributes to the injury complained of. *Indianapolis & St. L. R. Co. v. Blackman*, 63 Ill. 117; *Chicago, B. & Q. R. Co. v. Van Patten*, 64 Ill. 510. So, in this case, while it may be said that running the train more than 12 miles an hour, in violation of the ordinances, was negligence *per se*, (and the court below so instructed the jury,) yet the question of fact remains, did that negligence so far contribute to the injury as to preclude a recovery by appellee?

The only questions of law raised on the record are on the giving and refusing instructions. The second of appellee's instructions uses the language "that, in determining whether John C. Parker at the time of the accident made use of all the care, exertion, and skill to avoid the accident in question which could be reasonably expected of a locomotive engineer of ordinary prudence, care, and skill, it is proper for the jury to take into consideration," etc. The criticism made upon it is that the words "at the time" are used. It is said the language should have been, "before and at the time." The argument is that, without the word "before," the jury would be led to believe that, however negligent the deceased may have been in conduct leading up to and causing the collision, still if, at the very time of the accident, he was in the exercise

Ordinance
limiting speed
of train.

Consideration
of care exer-
cised by en-
gineer.

of due care, the plaintiff could recover. This, to say the least, is placing a very low estimate upon the intelligence of a jury. Certainly no one would construe the words here used to mean at the instant of the collision. How could a person "use care, exertion, or skill to avoid the accident" when it was actually taking place? The authorities cited in support of this objection are inapplicable.

The fifth instruction given on behalf of the plaintiff is on the measure of damages, and directs the jury "that, if they find for the plaintiff, they may assess the plaintiff's damages at such a sum as will be a fair compensation, with reference to the pecuniary injuries resulting from such death, to the widow and next of kin of John C. Parker, deceased, not exceeding the sum of five thousand dollars." It seems to be thought that this instruction is subject to the same objection sustained by this court to that given in *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426. That instruction was as follows: "The jury are instructed that by the statute of Illinois the plaintiff in this case cannot recover more than five thousand dollars, and, if they believe from the evidence that the plaintiff is entitled to recovery, they will render a verdict for no more than that amount." BREESE, C. J., rendering the opinion, said: "That is but telling the jury they must render a verdict for five thousand dollars." Can the same be said of this instruction? Certainly not. Here the jury are expressly told that the measure of recovery is the pecuniary loss sustained by the widow and next of kin by the death, but that recovery cannot exceed \$5,000. There is no error in this instruction.

Measure of
damages—In-
struction.

Appellant asked 20 instructions. The sixth, fourteenth, and seventeenth were given as asked. The fourth and seventh were modified and given, and the remaining 15 refused. No point is made as to the modification of the fourth and seventh. Of those refused, the first directed the jury to find for the defendant on the evidence. The second, that there could be no recovery on the second count of the declaration. The others are somewhat lengthy, and no good purpose would be served by setting them out at length. They are all objectionable. The third assumes that deceased was at the time of the accident running his train at so great a rate of speed as to put it out of his immediate control, and then tells the jury that for that reason there can be no recovery. The fifth is argumentative, but particularly objectionable in that it imposed upon the deceased the duty of running his train so as to be absolutely able to stop it in time to avoid a collision on the side track in case a switch should be left open. Under this instruction, however diligent

Defendant's
instructions.

and careful the deceased may have been in the management of his train, he could not recover. The eighth announces as a rule of law that running a train through the town of Lake at a greater rate of speed than allowed by the ordinances of said town was gross negligence in deceased, and barred plaintiff's right of recovery, regardless of the fact as to whether the speed of the train in any way contributed to the accident causing his death. The law is not so unreasonable. On this subject the jury was properly instructed in appellee's first and seventh, given. The ninth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth are each to the effect that it was the duty of the deceased to observe the signal given by the switch target showing that the switch was open, and if he did not do so plaintiff could not recover. Here, again, the duty is made absolute and imperative, regardless of the degree of care and diligence used by deceased. No matter what may have been done by appellant's employes or others to obscure or conceal the target, still, under these instructions, there could be no recovery. There is no evidence upon which to base the sixteenth. The eighteenth, nineteenth, twentieth are based upon joint rules of appellant and the Chicago, Rock Island & Pacific Railway Company and the rules of the latter company. They are all erroneous, for the reason that they make the want of obedience to such rules negligence *per se* on the part of deceased. The court very properly refused all these instructions, both because they do not correctly state the law, and also because those given on behalf of appellant fully and fairly instructed the jury as to the law applicable to the defense interposed. We find no substantial errors in this record, and the judgment of the circuit and appellate courts will be affirmed.

Excessive Speed—Precautions Taken by Employe to Avoid Injury—Instructions.—The deceased, a locomotive engineer, was killed by the overturning of his locomotive and the cars of the train through the spreading of the track. The train was a freight train, and the evidence showed that according to the rules in force at the time, such trains were required not to exceed a speed of 15 miles per hour, and that an order had been posted on bulletin boards reducing the speed of all freight trains on that part of the line to 10 or 12 miles per hour. The evidence showed that at the time of the accident, the train was running on a down grade at a speed of about 25 or 30 miles an hour; and that the deceased called for brakes twice, once at the top of the hill, and again just before the accident occurred. *Held*, that an instruction that if the jury found that the deceased, with knowledge of the condition of the track, ran his train at a speed exceeding that prescribed by his instructions, and that by reason of the excessive speed he contributed directly to the accident the jury must find for the defendant, was properly refused as it left out of view the precautions taken by deceased to regulate the speed of the train. *Texas & P. R. Co. v. Lester*. Tex. Sup. Ct., Nov. 8, 1889.

Same—Pleading—Sufficiency of Complaint.—The complaint averred that plaintiff was employed as watchman on a bridge, and that it was his duty to pass over the bridge from time to time to inspect it; that it was the duty of all engineers in charge of locomotives to give timely warning to the watchmen of their approach by sounding the whistle and ringing the bell, but that on the occasion in question the engineer of the train which occasioned the injury, negligently failed to sound the whistle and ring the bell as it was his duty to do, and in consequence of such neglect plaintiff was hurt. *Held*, that the petition was good on general demurrer, although it also contained an allegation that the train was running at a dangerous rate of speed without showing the relation which that fact sustained to plaintiff's injury. *Pike v. Chicago & A. R. Co.*, 39 Fed. Rep. 754.

Same—Failure to Give Statutory Signals—Injuries at Place Other than Crossing.—Section 806, Mo. Rev. St., concerning the ringing of bells and sounding of whistles at railroad crossings, was intended for the benefit of persons at the road crossing or approaching it, and not for the benefit of a person who was not hurt at a crossing, but was injured at a bridge half a mile from the crossing in consequence of the excessive speed at which a train was run, and he cannot assign the violation of the statutory duty as the proximate cause of the injury he sustained. *Pike v. Chicago & A. R. Co.*, 39 Fed. Rep. 754, citing *Bell v. Hannibal & St. J. R. Co.*, 72 Mo. 50, 4 Am. & Eng. R. Cas. 580; *Evans v. Atlantic & P. R. Co.*, 62 Mo. 57, 58; *Rohback v. Pacific R. Co.*, 43 Mo. 187.

Injuries to Employee—Negligence—Obscured View.—Plaintiff was an engineer of a freight train engaged in carrying iron ore from the defendant's mines. The ore was dumped into the cars by means of chutes with aprons or spouts attached, that when in a certain position obstructed the passage of cars on the track, the apron having to be raised in order that the trains might pass. Plaintiff on the day of the accident had to pass by the chute and then back up to it with his train that it might be loaded. It was alleged that defendant or its employees has negligently permitted the chute or apron from it to be so lowered over the track of the road that it was struck by the train and plaintiff seriously injured. It appeared from the evidence that the conductor of plaintiff's train had told the agent in charge of the chute, that the train was not to be run that distance and signaled the plaintiff to stop, but the latter did not see the signal because of the smoke from his engine and ran into the chute before it was removed out of the way. *Held*, that there was no evidence of negligence on defendant's part to support a verdict for the plaintiff. *Slate Creek Iron Co. v. Hall*, Ky. Ct. App., Dec. 7, 1889.

Misplaced Switch—Sufficiency of Evidence to Sustain Verdict.—Plaintiff, a fireman, was injured by jumping from the engine to escape being crushed in an impending collision. The evidence showed that a switch was misplaced, in consequence of which the train was thrown from the main track upon a side track, where a freight car was standing. There was no dispute that the switch was misplaced and there was no satisfactory evidence on the part of the defendant to explain how it came to be misplaced. The jury found for the plaintiff. *Held*, that as substantial justice had been done, the verdict would not be disturbed upon account of technical errors. *Western & A. R. Co. v. Lewis*, Ga. Sup. Ct., Jan. 7, 1890.

HUDSON

v.

CHARLESTON, CINCINNATI & CHICAGO R. CO.

(North Carolina Supreme Court, January 14, 1890.)

Master and Servant—Defective Appliances—Employer's Knowledge of Defect—Burden of Proof.—In an action to recover damages for injuries caused by the use of a defective engine, although the evidence may show that the engine was defective, unsafe and insecure, the burden does not devolve upon the defendant to show that its condition was not, and could not by the exercise of reasonable care and caution, have been known to its officers and agents.

APPEAL from Superior Court, Cleveland County.

Action to recover damages for personal injuries sustained by a brakeman in the employ of the defendant, who was injured while uncoupling a car, by reason of the alleged defective condition of the engine. There was evidence tending to show that the plaintiff after removing the coupling pin signaled the engine to go ahead; that instead it was moved backward; that the brakeman signaled the fireman who was in charge of the engine to stop; that he did so, and the brakeman went between the cars to uncouple them again when he felt the motion of the train backwards; that he attempted to get out but his foot was caught between two rails and crushed. The evidence also tended to show that the engine was old and defective, and that because of its defective condition the engineer sometimes could not control its movements. Judgment was rendered for the plaintiff, and the court having overruled a motion for a new trial, the defendant appealed.

Burwell & Walker for appellant.

Jones & Tillett and *W. A. Hoke* for appellee.

AVERY, J.—Where a servant rests his claim to damages against his employer upon the ground that he has been injured by defective machinery, furnished by the master to be used in the course of his employment, the burden is cast upon him, as plaintiff, to prove negligence *prima facie*, or subject himself to judgment of nonsuit. It is a well settled rule that he cannot relieve himself of the onus thus imposed upon him until he offers testimony tending to show (1) that the appliance or machine was defective; (2) that the injury was due to such defect, as the proximate cause; (3)

that the attention of the master had been called to the defect, or that, in the exercise of a degree of care commensurate with the character of the machine, he ought to have had knowledge of it. 2 Thomp. Neg. p. 996, § 12; *Id.* p. 984, § 11, sub-div. 2; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Railroad Co. v. Thomas*, 42 Ala. 672.

Some writers, who are generally recognized as authority, contend that the servant is required to show affirmatively, also, that he did not know of the fault in the machinery to which the injury was due, and that it was not so apparent that he could, with ordinary observation, have discovered it. 3 Wood, Ry. Law, § 386; Wood, Mast. & Serv. § 382; Beach, Contrib. Neg. § 123. The weight of authority, as well as the force of sound reasoning, sustain the rule, however, that it is incumbent on the defendant, if he would avoid liability for injuries caused by machinery furnished to the servant, when he knew or ought to have known of its dangerous condition, to aver in his answer and prove on the trial that the latter knew when he entered the service, or discovered during the term of service, and before he was injured, or by the exercise of ordinary observation or reasonable skill and diligence in his department of service might have known, that the appliance complained of was unsafe. 2 Thomp. Neg. p. 1008, § 15; Bailey, *Onus Probandi*, 127, 128; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa 14. In *Shearman & Redfield* on Negligence (section 99) the rule as to the *onus probandi* in cases of this kind is stated as follows: "In actions brought by servants against their masters, the burden of proof as to the master's knowledge, or culpability in lacking knowledge, of the defect which led to the injury, whether in the character of a fellow servant, or in the quality of materials used, rests upon the plaintiff. But, the plaintiff having proved the fault of the master in this respect, the burden of proving that the plaintiff also knew of such defect, and commenced or continued his service with such knowledge, rests upon the defendant. This fact being proved, it is then for the plaintiff to show, if he can, that the defendant induced him to continue his work by promising to remedy the defect." While a servant, in contemplation of law, contracts with reference to the danger of injury from fellow servants in common employment and the peril incident to the use of unsafe appliances, to which his attention is called before contracting, yet if he first discovers their dangerous condition after he has accepted employment, and willfully continues to incur the risk incident to the service, such voluntary exposure of his person is held to be contributory negligence on his part, and he is not entitled to recover damages for an injury

due to such defects, because of his own carelessness, and not on the ground that he agreed to subject himself to hazards of which he could not have known. Patt. Ry. Accident Law, § 327; Whart. Neg. § 217; *Pleasants v. Raleigh & A. A. R. Co.*, 95 N. Car. 195. Our statute (Laws 1887, chap. 33) requires that contributory negligence, when relied on as a defense, shall be set up in the answer and proved on the trial, and makes the rule applicable where an action is brought by an employe against his employer. We think, therefore, that his honor erred when he instructed the jury that, if they found the engine was defective, unsafe, and insecure, it devolved upon the defendant to show that its condition was not, and could not, by the exercise of reasonable care and caution, have been known to its officers and agents.

The learned judge who tried the case seems to have been misled by misconstruing the language used by this court in *Warner v. Western N. C. R. Co.*, 94 N. Car. 250, 25 Am. & Eng. R. Cas. 432. The burden of proof was not directly, nor, as we conceive, even incidentally, discussed in that case. The questions were—*First*, whether the complaint contained a statement of facts sufficient to constitute a cause of action; and, *second*, whether, if it was a defective statement of a cause of action, the answer was such that the doctrine of *aider* applied so as to cure any defects in the complaint. The court decide upon the first point that the complaint contained a sufficient statement of a cause of action when the plaintiff alleged in the third and fourth paragraphs that the defendant company “conducted itself so carelessly, negligently, and unskillfully in this behalf that it provided and used an unsafe, defective, and insecure locomotive,” and “that for want of due care and attention to its duty in that behalf * * * the boiler connected with the engine of said locomotive, by reason of the unsafeness, defectiveness, and insecurity thereof, exploded,” in consequence of which explosion plaintiff’s intestate was killed “without any negligence or want of care on his part.” It was held, in substance, that this was a sufficiently explicit declaration that the death was caused by the carelessness of the defendant, and that the fact that the defendant either knew, or by the exercise of ordinary care might have ascertained, the dangerous condition of the engine, was evidence to sustain the general allegation of carelessness, shown in providing defective machinery for the servants of the company, but was not an essential part of the allegation itself. The second point decided was that if the complaint contained a defective statement of a cause of action, the defendant had averred in his answer—*First*, that the engine had been repaired, and was in good condition; and,

second, that, if it was unsafe when it exploded, it became so after it was repaired and inspected, without the knowledge thereof on the part of the defendant, and the defects were cured. In the case of *Cowles v. Richmond & D. R. Co.*, 84 N. Car. 309, 2 Am. & Eng. R. Cas. 90, it is true that the judge who tried the case below instructed the jury that it was the duty of the defendant company "to furnish safe cars, supplied with necessary machinery and appliances to render them secure; and if the jury believed that it had failed in this, and thereby the plaintiff had been injured without any neglect or want of skill on his part, then they should find the issues submitted in favor of the plaintiff, without regard to the conduct of the engineer." But the court said: "The defendant's exception, as argued before us, does not go to any portion of his honor's charge as given, but only to his refusal to give that specially asked for." The instruction asked was intended to raise the question whether the testimony did not disclose the fact that the injury was due to the carelessness of a fellow servant of the plaintiff. It was therefore entirely unnecessary that this court should determine whether the charge of the judge was erroneous for failure to tell the jury that it was incumbent on the plaintiff to show that the defendant company either knew, or by reasonable diligence might have discovered, the condition of its cars. The court declared that the testimony was too meager to determine whether the engineer occupied the relation of fellow servant to the plaintiff, and, as the defendant had failed to show error, the verdict must stand. In the discussion of abstract principles that follow this announcement the court used the language which counsel insist imposes liability on a railroad company for injuries to its employes caused by unsafe machinery, whether the company had either notice or opportunity to discover the defect or not. We understand the court to have assumed in the argument in that case that the company did know of the dangerous condition of the cars, because upon the admitted facts the defect was so obvious that it must have been seen on inspection. This view seems clearly correct, when we consider that the learned justice who delivered the opinion said, in conclusion, in reference to the case of *Gibson v. Pacific R. Co.*, 46 Mo. 163: "This last case has been treated by Thompson in his work on Negligence as a leading one on those subjects, and we think that our conclusions in this case are in accord with the principles enunciated in those cases." The judge who tried that case below told the jury that if they found "from the evidence in this case that the apparatus used for coupling the cars by which the plaintiff was injured, or either of them, from its

make, and construction, was unsafe, and the defendant knew thereof, or might have known thereof by the exercise of reasonable care and diligence, they are instructed that the defendant is liable," etc. See page 167. In commenting upon this instruction, which had been excepted to, the appellate court said, (page 173): "But the instruction given for the respondent is well supported by authority and is founded in reason. If, by reasonable and ordinary care and prudence, the master may know of a defect in the machinery he operates, it is his duty to be advised, and not needlessly expose his servants or employes to hazard, peril, or mutilation." The qualification as to the liability of the master in this case is therefore the same given by Thompson, Wharton, Beach, Wood, and other leading text writers, and insisted on by defendant in its prayer for instructions.

It is not essential that we should consider any of the other errors assigned, but, as the case may come before us again, it is best to advert to two other exceptions. We think there was no error in refusing to charge, as requested, that there was no evidence that the engine was unsafe or defective, or that the injury was caused by the dangerous condition of the engine. The testimony of the witnesses Hudson, Ferguson, Huske, Jackson, and Sullivan tended to show that the engine was in a dangerous condition: and that of Bard, Bryson, Murray, and Hudson that the injury might have been due to the fact that it was not subject to the control of the engineer. It is not within our province to pass upon the weight of the evidence. We only decide that it was sufficient to require the court to submit the case to the jury. There was error in the instruction as to the burden of proof, for which there must be a new trial.

Defective Appliances—Employer's Knowledge of Defect.—See *Reed v. Burlington, C. R. & N. R. Co.* (Iowa), 31 Am. & Eng. R. Cas. 190; *Covey v. Hannibal & St. J. R. Co.* (Mo.), 28 *Id.* 382; *Crane v. Missouri Pac. R. Co.* (Mo.), 25 *Id.* 440, note 444; *Warner v. Western N. Car. R. Co.* (N. Car.), 25 *Id.* 432; *Ransier v. Minneapolis & St. L. R. Co.* (Minn.), 21 *Id.* 601, note 604; *Sioux City & P. R. Co. v. Finlayson* (Neb.), 18 *Id.* 68; *Texas & P. R. Co. v. Kane* (Tex.), 15 *Id.* 218; *Greene v. Minneapolis & St. L. R. Co.* (Minn.), 15 *Id.* 214; *Chicago & E. I. R. Co. v. Rung* (Ill.), 11 *Id.* 218; *Atchison, T. & S. F. R. Co. v. Holt* (Kan.), 11 *Id.* 206; *Little Rock & Ft. S. R. Co. v. Duffey* (Ark.), 4 *Id.* 637.

Machinery and Appliances—Obligation of Master—Duty of Employe to Inspect.—The burden of furnishing sufficient machinery, appliances, surroundings, etc., is upon the master; and, while the master is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and he is under no primary obligation to investigate and test the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect. *Chicago & E. I. R. Co. v. Hines*, Ill. Sup. Ct., March 29, 1890.

Same—Duty of Employer—Existence of Better Appliances.—Where the master has furnished machinery which is in general use for the purpose to which it is intended to be applied and which is generally regarded as reasonably safe if prudently used, he is not liable for injury to his employee arising from the use of such machinery, although better appliances may exist. *Lehigh & W. Coal Co. v. Hayes*, Pa. Sup. Ct., Oct. 7, 1889. *GREEN, J.*, who delivered the opinion of the court, said: "The rule in regard to the obligation of the employer, respecting the character of the tools and appliances furnished by him, has been repeatedly stated in the recent decisions of this court. Thus, in *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. St. 276, 5 Am. & Eng. R. Cas. 508, we said that, when the employer furnished his employees 'with tools and appliances which, though not the best possible, may, by ordinary care, be used without danger, he has discharged his duty, and is not responsible for accidents.' In *Payne v. Reese*, 100 Pa. St. 301, we said: 'An employer is not bound to furnish for his workmen the "safest" machinery, nor to provide the "best methods" for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required from the employer. This is the limit of his responsibility, and the sum total of his duty.' In *Allison Manuf'g Co. v. McCormick*, 118 Pa. St. 519, we said: 'The general rule requires of the master that he provide materials and implements for the use of his servant such as are ordinarily used by persons in the same business; but he is not required to secure the best known materials, or to subject such as he does provide to a chemical analysis in order to settle, by experiment, what remote and possible hazard may be incurred by their use.' In *Delaware Riv. I. Ship Building Works v. Nuttall*, 119 Pa. St. 149, we held that the employer was under no obligation to give warning to his employees of the dangerous character of a circular saw, or to provide it with a spreader to prevent accidents. As to the spreader we said: "The testimony shows that such an attachment is not in general use, and that there is no general agreement among mill-owners or practical sawyers that it is a desirable or a useful attachment. It is not enough that some persons regard it as a valuable safeguard. The test is general use. Tried by this test the saw of the defendant is such a one as the company had a right to use, because it is such as is commonly used by mill-owners; and it was error to leave to the jury any question of negligence based on the failure to provide a spreader."

Same—Evidence—Attaching Defective Car to Train.—Where a defective car has been attached to a train and there is nothing to show that it is different from other cars, and it became necessary to use the car in such a manner as to injure a brakeman who had no knowledge of its condition, there is *prima facie* evidence of negligence on the part of the company, although there is no proof that it had notice of the defect. *Guthrie v. Maine Cent. R. Co.*, Me. Sup. Jud. Ct., June 5, 1889.

Same—Instructions as to Employer's Duty.—In an action for damages for personal injuries, defendant requested the court to charge that "an employer does his duty when he provides for his employees in such manner as he fairly and reasonably deems prudent and safe, and if he furnishes appliances which, although not the best that can be obtained, yet may be used without danger, he has discharged his duty and is not responsible for accident or injury." *Held*, that the charge was properly modified by substituting the words, "is fairly and reasonably prudent and safe," for the words, "he fairly and reasonably deems safe," and by saying that it was not what the employer decides might be prudent, "but what is, in point of fact, reasonable, prudent, and safe, that he is required to furnish." *Pittsburgh & W. R. Co. v. McCombs*, Pa. Sup. Ct., Nov. 4, 1889.

Same—Instructions—Risk Assumed by Brakeman.—Plaintiff, a brakeman, sued to recover for injuries caused by a car on which he was at work leaving the track. The defendant requested the court to instruct the jury that if the accident was caused by the breaking of a rail the plaintiff could not recover, as the risk was one assumed by him as incident to his employment. *Held*, that the instruction was properly modified by saying "unless the breaking of the rail was the result of the culpable negligence of the defendant." *Pittsburgh & W. R. Co. v. McCombs*, Pa. Sup. Ct., Nov. 4, 1889.

Same—Presumption of Negligence Arising from Happening of Accident.—It is error for the court to charge, in an action by an employe for damages for injuries received through the overturning of a car on which he was travelling, that while "the burden of proof is on the plaintiff to show negligence of the defendant, yet it is sufficient for that purpose *prima facie* if he show that he suffered injury without his fault while lawfully travelling in the car of the defendant, and that the cause of the injury was probably the negligence of the defendant," and that "whether it is so or not is in the knowledge of the defendant, and the defendant must then show what the real cause of the injury was, and if the defendant does not choose to give the explanation, a jury will be authorized to find that the real cause of the injury was the negligence of the defendant in the particular case specified in the complaint." *Minty v. Union Pac. R. Co.*, Idaho Sup. Ct., March 11, 1889.

Same—Presumption—Instructions.—The presumption of negligence does not arise as between master and servant, from the occurring of an accident, and it is error for the court to charge "that if the car was overturned by reason of any defect in said car, or of the track on which it was running, this is of itself, presumptive evidence of negligence on the part of the defendant, and the burden is then on the defendant to show that there has been no negligence whatever." *Minty v. Union Pac. R. Co.*, Idaho Sup. Ct., March 11, 1889.

Same—Employe's Knowledge of Defect—Use of Switch-Engine Having Square Tank.—The negligence charged consisted in the use of a switch-engine, having a square tank instead of a sloping one; the latter being more suitable for switching purposes. The court refused to charge at the defendant's request that if there were any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known of the same, and the said defects contributed to the injuries complained of, the jury should find for the defendants. *Held*, that as the evidence disclosed that the deceased could see that the engine had a square tank, but failed to show that he was aware of the different degrees of danger between the use of that and one with a sloping tank, or that he understood the nature of the danger to himself from the use of the square tank, the charge was properly refused, as the law charged him with knowledge only of such defects as were open to his observation. *Missouri Pac. R. Co. v. Lehmberg*, Tex. Sup. Ct., Nov. 8, 1889.

Same—Duty of Company as to Brake-Shoes.—A railroad company is, as in a question with its employes, only bound to furnish brake-shoes which are effectual for the purpose for which they are used, and although new brake-shoes are two inches in thickness and the brake-shoe which was alleged to have been defective and to have caused plaintiff's injury was only half an inch thick, the fact that the brake-shoe had been so worn is not sufficient to establish negligence on the part of the company in the absence of evidence to show that the brake could not be applied, or that when applied it was not so effective as it should have been, or would have been with thicker brake-shoes. *Smith v. New York Cent. & H. R. R. Co.*, N. Y. Ct. App. Second Div., March 11, 1890.

Same—Province of Jury—Sufficiency of Evidence.—In an action for damages resulting from personal injury received by reason of the reverse lever of a locomotive becoming detached and changing the motion of the engine, and by which it was sent violently against a car upon which the plaintiff in the action was standing, a question was presented on the trial as to whether the lever became detached by reason of a defective construction of the "reverse lever," "quadrant," and "dog," or by the want of care of the engineer. It was *held*, upon the evidence submitted, that the question was a proper one for the jury, there being some evidence of a defect in the operation of the machinery. *Burlington & M. R. Co. v. Wallace*, Neb. Sup. Ct., Dec. 17, 1889.

Same—Reverse Lever of Engine—Competency of Evidence of Defect.—A witness, who was a switchman, was called by the plaintiff in the suit for the purpose of showing a defect in the appliances used for the purpose of reversing the motion of the engine, and stated that to his knowledge the reverse lever of that engine had become detached on two other occasions, by which the control of the engine was temporarily lost by the engineer. Upon cross-examination he stated that he could not see the lever "fly back," but that upon each occasion he was with the engine, saw its movements, by which it refused to change its course, but accelerated its speed, at a time when not required, and demanded of the engineer the cause of the failure to follow his directions, when the engineer said, "It flies back." The trial court refused to strike out the evidence of the witness upon the motion of defendant. *Held*, no error and no prejudice. *Burlington & M. R. Co. v. Wallace*, Neb. Sup. Ct., Dec. 17, 1889.

Same—Opinion Evidence—Necessity of Safety Switch—Competency of Witness.—Where an action is brought to recover damages for the death of a railroad engineer, caused by an alleged defective switch, a person whose only employment about a railroad has been as fireman on an engine and as an operator of a coal-shovel, and who is not a civil engineer nor acquainted with railroad building, is not qualified to testify as an expert, as to the necessity of having a device known as a safety-switch at the place of accident. *Ballard v. New York, L. E. & W. R. Co.*, Pa. Sup. Ct., April 29, 1889.

Same—Pleading—Sufficiency of Declaration to Support Verdict.—Where the plaintiff sues to recover damages from a railroad company for the killing of an employe, in consequence of its negligence in constructing its road, the fact that the declaration does not state that the defendant knew of the defect in the road, or that the plaintiff did not know of it, does not render it insufficient to support a judgment in favor of the plaintiff. *Chicago & E. I. R. Co. v. Hines*, Ill. Sup. Ct., March 29, 1890.

Same—Pleading—Amendment—Statutory Cause of Action.—Where the plaintiff, in an action to recover damages for injuries caused by defective materials knowingly furnished by his master declared on the common law liability of the employer, an amendment alleging a right to recover under a statute introduced a new cause of action, although the facts set out in the common law declaration are sufficient to sustain the right of action under the statute, and such amendment cannot be permitted. *Bolton v. Georgia Pac. R. Co.*, Ga. Sup. Ct., Nov. 11, 1889.

Same—Instructions as to Duty of Company.—Plaintiff sued for injuries sustained while engaged in uncoupling cars, by his foot becoming fastened between the guard rail and track rail, and by being run over by a car. The court instructed the jury as follows: "(2) Railways are not bound to their employes to provide the best possible appliances, but they are bound only to supply such appliances as are in common use by well managed railways, and which they have skillfully constructed and carefully maintained in repair. They are bound to furnish such appliances as are reasonably safe

and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances."

"(12) If the tracks, switch, and guard at the place of the injury were in ordinarily good condition as to safety and fitness, as defined in section 2 of this charge, then the plaintiff cannot recover." *Held*, that the instructions were such as to justify the jury in believing that more than ordinary care was required of a railroad company to furnish reasonably safe appliances for the performance of employees' duties, and that they were erroneous. *International & G. N. R. Co. v. Bell*, Tex. Sup. Ct., Nov. 5, 1889.

Same—Instructions—Duty to Inform Employee of Danger.—Plaintiff was hired as a plumber, and when not so engaged he was to make himself generally useful about the shops of the company. Whilst assisting in taking a locomotive to the round-house, he was directed to block the locomotive with a railroad tie and was injured in consequence of the use of the tie. Defendant requested an instruction that it was only bound to use ordinary care in furnishing safe implements and appliances to its servants; that it was only required to use those in ordinary use in and about its workshops and yards; and that unless other more suitable and safe implements were in use by railways, the plaintiff could not recover. *Held*, that it was error to so instruct the jury, as the instruction implied that the tie was an implement in general use for the purpose to which it was applied, and exonerated the company from liability on the ground that it had no better implement, and also ignored the defendant's duty to inform plaintiff of the danger arising from the use of the tie, which he could not be presumed to know. *Texas M. R. Co. v. Douglass*, Tex. Sup. Ct., March 19, 1889.

Same—Instructions—Experience of Employee.—Where the plaintiff sues for personal injuries sustained by him while in the employment of the defendant, and the jury has been instructed as to the question of his experience in the use of the appliances furnished to him, an instruction that the plaintiff must show that the injury was the immediate result of the negligence of defendant's agent "in directing plaintiff to use said implement in an unskillful and dangerous manner, the plaintiff himself being inexperienced in the work * * * and by reason thereof was ignorant of the danger," is not open to the objection that it assumes that the plaintiff was inexperienced, and thereby infringes upon the province of the jury. *Texas M. R. Co. v. Douglass*, Tex. Sup. Ct., March 19, 1889.

Same—Instructions—Assumption that Engine Defective.—Where plaintiff sues for damages for negligently causing the death of her husband, who was run over by a switch engine, an instruction that if the jury believed that the injury was caused both by the defective construction or unfitness of the engine for the purposes for which it was then used, and the negligence of the engineer and yard foreman, combined with said defect in engine, the defendant will be liable, does not assume that the engine was defective and unsuitable, nor is it a charge upon the weight of the evidence and is not open to objection on these grounds. *Missouri Pac. R. Co. v. Lehmburg*, Tex. Sup. Ct., Nov. 8, 1889.

GRUBE

v.

MISSOURI PACIFIC R. CO.

(Missouri Supreme Court, June 10, 1889.)

Municipal Ordinances—Applicability to Yards of Railroad Company.—Municipal ordinances limiting the speed of trains within the city limits, and requiring lights to be displayed when moving at night, apply to the movement of cars in the yards of a railroad company.

Master and Servant—Selection of Foreman—Reputation of Unfitness.—To show a want of reasonable care in selecting a fit and competent person to act as foreman, and in retaining him in service, it is competent to put in evidence, not only his general reputation of unfitness for the duties assigned to him, but also specific acts of negligence, or of incompetency, with evidence of knowledge thereof on the part of the master.

Same—Contributory Negligence—Sufficiency of Instruction.—An instruction in an action for damages which directs a verdict for the plaintiff, if the facts therein stated be found to be true, and the deceased was injured "without negligence on his part directly contributing thereto," is not open to the objection that it ignores the question of negligence on the part of the deceased, when the jury are instructed that the plaintiff could not recover if deceased was guilty of negligence, or if he knew, or by the exercise of care, might have known, that the person through whose negligence the accident occurred was an incompetent or negligent foreman and he thereafter continued in defendant's employ.

APPEAL from Circuit Court, Cass County.

T. J. Portis and Adams & Bowles for appellant.

Prosser Ray and L. E. Wyne for respondent.

BLACK, J.—The plaintiff is the widow of Frank T. Grube. She brought this suit to recover damages for the death of her husband, who was injured in the defendant's switch-yards at Kansas City on the 20th November, 1883, Case stated. and from which injuries he died two or three days later. There was a verdict and judgment for plaintiff, and the defendant appealed.

There are some facts set out in the petition, disclosed by the evidence on both sides, and about which there is no dispute, and they are, in substance, these: The accident occurred between half past 6 and 7 o'clock in the afternoon, on side track No. 6. It was dark at that Facts. time. The switch tracks run in an east and west direction, and No. 6 is a short track, just to the north of a main switch track. The water plug and coal chutes are on the west end of No. 6. It was the duty of the switch crews to go on this

track in the evening, take on coal and water and oil, and prepare their engines for the night-work. At the time in question there were three engines on the track preparing for the night work, and waiting for orders from the yard master. These engines all fronted east; 806 stood furthest west, 804 stood six to twelve feet east, 801 stood three to six feet east of that, and a few feet further east there were three cars standing on the same track. Grube, the deceased, belonged to what was called the "West-End Crew." He was sitting on the pilot-beam of his engine, it being 804, which was the middle of the three engines as they stood on the track. At this time O'Neal, who was the foreman of another crew, known as the "East-End Crew," backed a train of from 18 to 35 cars in on the east end of track No. 6. He ran the train against the three cars, driving them on engine 801, which was forced against 804, and the whole in turn against 806, driving it backwards some distance. Grube was caught and injured in the collision, while sitting on the pilot-beam of engine 804. It may be stated here that he was at his proper place.

The petition sets out two sections of an ordinance of the City of Kansas whereby it is enacted: "Sec. 5. No conductor, engineer, fireman, brakeman, or other person shall move, or cause or allow to be moved, any locomotive, tender, or car within the city limits at a greater rate of speed than six miles per hour, under a penalty of not less than twenty-five dollars, nor more than \$500." "Sec. 10. No conductor, engineer, fireman, brakeman, or other person in charge of any locomotive tender, car, or train of cars shall run, or move, or cause or allow to be run or moved, for any purpose whatever, within this city, between sunset and sunrise, any such locomotive, tender, car, or train of cars without having at least one lamp, head-light, or lantern conspicuously placed in front of the same, facing the direction in which the same may be moving, whether running forward or backward, under a penalty of not less than \$25, or more than \$500." The petition then counts upon a violation of both sections of the ordinance by O'Neal, and alleges that he was an incompetent foreman, and charges negligence on the part of the defendant in employing and retaining him in its service. The further evidence for the plaintiff tends to show that O'Neal ran his train in on the side track, and against the three cars and the engines, at a rate of speed from 9 to 11 miles per hour; that he had no one on the west end of the train, or near enough to it to receive danger signals from persons at or about the coal chutes. The proof is clear and undisputed that there was no light on that end of the train which came

in on the side track. For the defendant, O'Neal testified that his train was moving at the rate of about three miles per hour; that he had a man with a lantern at the west end of it, who was on the ground, and a passing train on another of the tracks obstructed his view, so that he could not communicate with his engine; that this man failed to make the coupling as the cars came in contact, and hence the collision. There is evidence tending to show that O'Neal was a reckless and careless foreman, and known to be such by his superior officers; and, on the other hand, there is evidence to the effect that he was a careful and prudent man, and so reputed to be.

The case was placed before the jury on the theory of the petition, namely, that a violation of the ordinance either in moving the train at a greater rate of speed than six miles per hour, or in failing to have a headlight, lamp, or lantern placed in front of the same, facing the direction in which the train was moving, was negligence on the part of O'Neal, and that his negligence in either of these respects, coupled with the facts that O'Neal was an incompetent and careless foreman, and that defendant was negligent in retaining him in its service, laid a foundation for recovery by the plaintiff. On all these points the instruction given on the one side and the other are full and fair, and need not be set out in detail.

It was, however, admitted on the trial that these switch-yards where the accident occurred had never been laid off into streets or alleys; that they were not used by the public, and were in the exclusive use of the defendant, but on three sides were not fenced. They are partly in Kansas. The accident happened at a point in this state. On these admissions the court refused to instruct that the ordinance had no application to the defendant in the transaction of its business in the yards. While there is abundant evidence upon which the case could go to the jury without reference to the ordinance, still the case is made to stand on the ground that a violation of the ordinance in either respect was negligence, and whether the ordinance applies to the defendant in the movement of its cars in its yards is a vital question, as the case stands on this record. There can be no doubt but the state has the power to regulate the speed of trains, and to make other reasonable regulations for the movement of locomotives and trains of cars in cities, towns, and other crowded places. Such regulations concern domestic government, and are but the exercise of the police powers of the state. *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91; *Mobile & O. R. Co.*

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apply to
movement of
trains in yard.

v. State, 51 Miss. 137; *Knobloch v. Chicago, M. & St. P. R. Co.* 31 Minn. 402, 14 Am. & Eng. R. Cas. 625; *Tied, Lim. of Police Powers*, § 194. The power to enact such regulations may be delegated to cities and towns. *Merz v. Missouri Pac. R. Co.*, 88 Mo. 672, 26 Am. & Eng. R. Cas. 537. In the case last cited it was insisted that, as the place where the accident occurred was on private grounds of the defendant, to make the ordinance there in question apply to it would be to deprive defendant of the use of its property. This court then said, adopting the language of the court of appeals: "When a railroad company lays down its tracks in a populous city, not within any inclosure, but on ground open to the public, the mere fact that the rails are not laid over a public street or highway, but on private property of the company, ought not to be held to relieve it of its obligation to observe all reasonable municipal regulations as to the movement of its trains within the limits of the corporation." The power to regulate the speed and movement of trains in cities and towns, both on the streets and elsewhere, is recognized and reasserted in *Rafferty v. Missouri Pac. R. Co.*, 91 Mo. 33. The state, and through it the City of Kansas, having the power to make reasonable regulations for the movement of trains within the corporate limits, there is no reason why a forced construction should be given to the ordinance in question with a view of exempting the defendant's yards from its operation.

The fifth section of the ordinance, the one which regulates the rate of speed, contains no qualifications whatever. The tenth section prohibits the movements of cars, locomotives, and trains between sunset and sunrise "for any purpose whatever," except there be displayed on the moving front a light. The ordinance makes no mention of streets, public or private grounds, but applies alike to all places in the city limits. There is nothing in the language used which will admit of the exemption of the defendant's yards. The ordinance is designed as well for the protection of those engaged in handling cars as for persons not thus engaged. In *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 658, 18 Am. & Eng. R. Cas. 56, an ordinance prohibited the running of a car or engine in the city at a greater rate of speed than six miles per hour. The plaintiff was a laborer employed in the railroad yards in cleaning snow and ice from the track, and was injured by a car, which it was claimed was being moved at a greater rate of speed than six miles per hour. The contention made there was that the ordinance was applicable only to that part of the city used by the public, but the court held it could not be so limited in its operations. The de-

defendant places much reliance upon the Rafferty Case, before cited, where it was held a demurrer to the evidence should have been sustained. It is worthy of mention, though not made an element in the result there reached, that the boy who was injured in that case had no right to be in the car-yards or on the cars. His presence was unknown to the defendant's servants. Here the deceased was where his duties placed him, and the defendant owed him an active duty. Again, the ordinance in that case is essentially different from the ordinance in this case. There two empty box-cars were detached, and allowed to go down an incline, accompanied by a brakeman. He got down and coupled them to some standing cars, and they all moved on and struck a car on which the boy was standing. We were of the opinion that the box and other cars, when thus attached for the purpose of storage on the side track, though moving, did not constitute a backing train, propelled by steam, within the meaning of the ordinance. The accident there happened in the yards, as in the present case, but in all other essential respects the cases are wholly unlike. Our conclusion is that the ordinance does apply to the defendant in the movement of its trains in its car-yards; that the ordinance is reasonable as to the rate of speed is clear; and we think it is reasonable in requiring a light to be placed at the moving front of such a train as the one of which O'Neal had charge. These propositions as to the reasonableness of the ordinance do not appear to be disputed by appellants, and in this respect we express no further opinion upon the ordinance than that just stated. Indeed, the case was not tried by the defendant upon the theory that the ordinance is unreasonable, but upon the theory that it did not apply to the movement of cars and trains in the switch-yards.

2. Plaintiff proved by several witnesses that at and prior to the accident in question O'Neal bore the reputation among the men with whom he worked of being a careless foreman. This was followed up by evidence of various specific acts of negligence on his part in handling cars with his crew, and knowledge of them by the yard-master. To all this evidence the defendant objected. It was certainly the duty of the defendant to use reasonable care in selecting fit and competent persons to discharge the duties assigned to them. To show a want of such care, either in employing the servant or in retaining him, it is competent to put in evidence his general reputation of unfitness for the duties assigned to him. Wood, Mast. & Serv. § 420. And for a like purpose specific acts of negligence or of incompetency, with evidence of knowledge thereof on the

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Reputation of
foreman.

part of the master, may be put in evidence. *Id.* § 432. Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230.

3. The further point made by appellant, and not before noticed, is that the plaintiff's second instruction ignores the question of negligence on the part of the deceased, and ignores his knowledge of O'Neal's incompetency. This instruction directs a verdict for plaintiff, should the facts therein stated be found to be true, and among other things the jury were required to find that deceased was injured "without negligence on his part directly contributing thereto." The jury were told by appropriate instructions, given at the request of the defendant, that the plaintiff could not recover, if deceased was guilty of negligence, or if he knew, or by the exercise of care might have known, that O'Neal was an incompetent or negligent foreman, and that deceased thereafter continued in defendant's employ. It is plain to be seen that these questions were not ignored, but were put forward in strong terms in a series of seven instructions given at the request of the defendant. There is little or no evidence of negligence on the part of deceased, for it was his duty to place himself on the pilot-beam to be taken to his work. He had been in the employ of defendant but a short time, and then not with O'Neal, but worked with a different crew and in a different part of the yards. But these questions of his negligence and knowledge of O'Neal's habits were all placed before the jury in a manner of which defendant cannot complain. The judgment is affirmed. All concur, BARCLAY, J., in the result.

Regulation of Speed—Applicability of Ordinance or Statute.—See Central R. & B. Co. v. Smith (Ga.), 34 Am. & Eng. R. Cas. 1; Harris v. Central R. & B. Co. (Ga.), 30 *Id.* 581; Baltimore & O. R. Co. v. State (Md.), 19 *Id.* 83; Crowley v. Burlington, C. R. & N. R. Co. (Iowa), 18 *Id.* 56.

Incompetency of Employee—Evidence as to Carelessness—Opinion of Brakeman.—An experienced brakeman who has worked upon the train operated by an engineer, whose competency and carefulness is in issue in the action, is qualified to testify as to the carelessness of the engineer in running the trains, and especially in coupling cars, and generally as to his competency and carefulness in all matters which do not involve a technical knowledge of the machinery of the engine. Houston & T. C. R. Co. v. Patton, Tex. Sup. Ct., June 30, 1888.

Same—Evidence—Necessity of Repairs on Engine.—Plaintiff, a brakeman, was injured by the alleged carelessness of the engineer on May 25, 1883. An engineer and machinist testified that he worked in the shops of the defendant from February to October, 1883; that the engineer habitually brought engines into the shop out of repair, and that the defects were such as would not have occurred if he had exercised proper care. *Held*, that the evidence was admissible, and was not open to the objection that it was not applicable to the carelessness of the engineer at or prior to the time of the injury. Houston & T. C. R. Co. v. Patton, Tex. Sup. Ct., June 30, 1888.

Same—Engineer—Sufficiency of Evidence.—Where a brakeman sues a railroad company for injuries alleged to have been caused by the negligence of the defendant's engineer, who, it was claimed, was habitually careless in the management of his engine, there is sufficient evidence to support a verdict for the plaintiff on the ground of the engineer's incompetency and carelessness and the knowledge of the defendant thereof when there is testimony tending to show that the engineer was careless in making couplings and in operating trains, that he had been reported to the conductor, and also that his engine came into the shop out of repair with defects that would not have occurred if he had exercised proper care. *Houston & T. C. R. Co. v. Patton*, Tex. Sup. Ct., June 30, 1888.

Same—Retention in Service—Promise to Discharge.—In an action to recover damages for injuries sustained by using a ladder made by a workman under the plaintiff whom he knew to be incompetent, promises made by a person representing the employer that such workman should be discharged as soon as possible are inadmissible, although plaintiff alleges that he was induced thereby to remain in the service. *Bolton v. Georgia Pac. R. Co.*, Ga. Sup. Ct., Nov. 11, 1889.

Same—Special Findings Negating Negligence—Verdict for Plaintiff.—Plaintiffs sued to recover damages for the death of their son, an employee on a construction train, which had been sent out to find washouts and repair the track. The complaint alleged that the injury was caused by the reckless speed with which the train was allowed to approach a washout, and that the defendant was negligent in selecting and retaining the employees in charge of the train, although they were incompetent and unqualified for the performance of the duties required of them. It appeared that the plaintiffs' son knew the purpose for which the train started. *Held*, that a general verdict in the plaintiff's favor could not be allowed to stand where the jury found specially that the employees in charge of the train were not selected by the defendant without the exercise of ordinary care, and that the accident was not proximately caused by the negligence of any of them. *Vaughn v. California Cent. R. Co.*, Cal. Sup. Ct., Jan. 30, 1890.

Same—Instructions—Evidence of Negligence.—An instruction that the employer is liable if he has not used reasonable care in selecting the plaintiff's fellow-servants or if he has retained such fellow-servants in his employment after knowledge of their unfitness for the service, ought not to be given when there is no evidence that the accident by which the plaintiff was injured, was caused by the act of an incompetent servant. *Gulf, C. & S. F. R. Co. v. Blohn*, Tex. Sup. Ct., May 2, 1889.

MISSOURI PACIFIC R. CO.

v.

JONES.

(*Texas Supreme Court, November 19, 1889.*)

Master and Servant—When Relation Exists—Employment of Yard Hand by Another Company.—A complaint averred that the general yard master employed plaintiff and placed him at work in the yards of the defendant to couple and uncouple cars for it; that this was the result of an agreement between the defendant and another company, by which the latter were to furnish a crew to make up trains for defendant in its yards; that plaintiff and the yard master received their pay from the other company, but that

plaintiff was at the time working for defendant, and he was injured without fault on his part by defendant's negligence in failing to keep its yard in repair. *Held*, that the averments were sufficient to establish the relation of master and servant by inference from the service performed and the connection of the companies.

Same—Evidence—Negligence of Employer.—The track on which the injury occurred was kept in repair by defendant, who had control of the yard, and was dug out between the ties about a day before the accident. The roadmaster was informed of the danger, but the track was left in its defective condition. The evidence also supported the averments of the complaint as to the relation which the plaintiff bore to the defendant. *Held*, that it was sufficient to show that he was a servant of the defendant, and that at the time of performing services for it he was injured by reason of its negligence.

Same—Contributory Negligence—Province of the Jury.—The evidence showed that defendant caused holes to be dug between the cross ties and were left in that condition although the roadmaster was informed of the danger. Plaintiff while engaged in coupling cars, was injured by reason of the existence of the holes. It did not appear that he had any knowledge of the defect, and it was shown that he could not have seen the holes without stooping down, and that this could not be done by reason of the moving of the cars. There was testimony that it was plaintiff's duty to remain between the cars after going on the track and to try to effect a coupling, although there was also evidence tending to prove that it was his duty to come out and signal the engineer if the coupling was not at first made. *Held*, that the question of defendant's negligence and plaintiff's contributory negligence was for the jury.

Damages—Excessive Verdict.—A verdict of \$6,000 for injuries depriving the plaintiff of the use of one hand, is not so excessive as to justify the court in setting it aside.

APPEAL from District Court, Tarrant County. Commissioners' decision.

Action to recover damages for injuries received by plaintiff whilst employed by the defendant. The defendant appeals from a judgment for the plaintiff.

Finch & Thompson for appellant.

D. W. Humphreys for appellee.

HOBBY, J.—It is urged by the appellant that the petition shows no cause of action against it, and that it does show that plaintiff below was not in its employ, and that the defendant owed him no duty. The averments showing appellant's liability were that one Phailing, the general yard-master, employed plaintiff and placed him at work in the yards of the Missouri Pacific Railway Company to couple and uncouple cars for said company; that this was the result of an agreement between the appellant and the receivers of the Texas Pacific Railway Company, by which the latter were to furnish a crew to make up trains for the Missouri Pacific Railway Company in its yards; that plaintiff and Phailing, the yard-master, received their pay from the receivers, but that plaintiff was at the time

Pleading—
Sufficiency of
complaint.

working for the appellant, and he was injured without fault on his part, but by the negligence of appellant, in failing to keep its yard in repair, and allowing its roadbed and track, at the place of injury, to become dangerous by causing its servants to throw out the dirt between the cross-ties, thereby leaving deep and dangerous holes, which plaintiff did not see, and which, by stepping into, in attempting to couple the cars of appellant, the injury was done. These averments were sufficient to establish the relation of master and servant, by inference, from the service and connection of the companies, and showed the liability of appellant. *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 152, 25 Am. & Eng. R. Cas. 446.

The second assignment is that the evidence did not show that plaintiff was in the employ of appellant, nor did it show that the latter owed him any duty as an employee; that, if any liability was shown, it was upon the part of the Texas Pacific Railway Company, in whose employ plaintiff was at the time. The substance of appellant's contention, under this assignment, is that the case made by appellee showed him to be in the service and pay of one company, while recovering damages from another for an accident occurring on its premises, with no proof to sustain the denied averments of a contract by which he was shown to be rightfully there. Nor was there proof that appellant controlled the cars where he was at work. Upon this branch of the case the facts were that appellee was, at the time of, and for several months prior to, the injury, at work for appellant in its yards at Fort Worth, Tex. He was employed by Phailing, the yard-master, and received his pay from the Texas Pacific Railway Company. Appellee's duties were to stay in the yard, and make up trains. The track on which the injury occurred was kept in repair by appellant. The appellant had control of the yard. It had the track on which appellee was injured dug out between the ties about a day before appellee was hurt. Holes were opened out, about where he was injured, and there were no ties to put in them. The road-master was informed of the danger, but the track was left in that condition. The facts show that appellee was the general servant of the Texas & Pacific, and the special servant of the appellant. He performed special services for the latter, while the general servant of the former, and while so performing this special service he was the servant of appellant at the time. There was no proof of an express contract showing the relation of master and servant between appellant and appellee, but the evidence of the service performed by Jones for the Missouri Pacific Railway Company, and the connection between the two companies, authorized

Sufficiency of evidence.

the inference that this relation did exist. In the case of *Gulf, C. & S. F. R. Co. v. Dorsey*, 4 Tex. Law Rev. 115, cited in *Gulf, C. & S. F. Ry. Co. v. Dorsey*, *supra*, the plaintiff was employed to serve the several companies in their respective yards. It was held that he was the servant of the one in whose yard he was when injured. The proof, we think, shows that by some arrangement, the precise nature of which could not be ascertained, between the Texas Pacific and the Missouri Pacific Railway Company, it was the duty of the appellee, who received his pay from the former company, to switch and couple and uncouple the cars in the yard of the appellant, and on its track, over which the appellant had exclusive control, and whose duty it was to keep said track in repair; and that at the time of performing these services for the Missouri Pacific he was injured by reason of its negligence. While engaged in this service for appellant, with its knowledge, and under its agreement that the appellee should perform such service, he was the servant of the appellant. It was immaterial that he was not paid directly by appellant. The inference was authorized that appellant paid the Texas Pacific for his services, which would be tantamount to a payment to him. The payment we believe to be immaterial under the facts of this case. He had for a long time prior to the injury worked for the appellant. His labor was accepted up to the time of the injury. These facts made appellee the servant of appellant in the transaction in which the damage was sustained, by reason of the service performed. The principles announced in *Gulf, C. & S. F. R. Co. v. Dorsey*, *supra*, fully authorize the recovery in this case against the Missouri Pacific Railway Company, upon the ground of the liability of said company to appellee. To the same effect is the case of *Vary v. Burlington, C. R. & M. R. Co.*, 42 Iowa, 248. In the case of *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441, which is in many of its features analogous to the case under consideration, Snow was in the employ and pay of the Western Railway Company, and operating its cars; and he was allowed to recover damages from the Housatonic Railway Company by reason of its negligence in permitting a hole to remain in its roadbed, into which Snow stepped while coupling, as in this case, a moving car of the Western Railway, which was passing over the road of the Housatonic Railway.

The next assignment is to the effect that the evidence did not show appellant guilty of negligence which ought to render it liable, and that appellee's want of care produced the injury complained of. The negligence of the appellant is very clearly shown by the evidence to have consisted in leaving the holes between the

**Contributory
negligence.**

cross-ties on the track where the injury occurred, and this, too, after being warned of the danger. It is not made to appear that the appellee had any knowledge of this defect in the track, and it was shown by the evidence that he could not have seen these trenches without stooping down at the time; and this could not be done by reason of the moving cars, which prevented it. There was testimony that it was the duty of the appellee to remain in between the cars, after going in on the track, and try to effect a coupling. Some of the testimony of appellant's witnesses indicate that it was his duty to come out, and signal the engineer, if the coupling was not at first made. The evidence upon this point being conflicting as to whether appellee was himself negligent in the manner in which he conducted himself while endeavoring to make the coupling, as well as whether appellant's track was in such a condition for the proper discharge of the duties which devolved upon appellee by reason of his employment, as he had a right to expect, and as it was appellant's duty to have it, these were all questions of fact to be determined by the jury, and we cannot say that the evidence does not fully support their finding upon this point. *Union Pac. R. Co. v. Randall*, 50 Tex. 260.

The fifth assignment is that the verdict is excessive. It was for \$6,000. The injury was such as to deprive appellee of the use of one hand. In the case of *Oil Co. v. Malin*, 60 Tex. 651, the appellee had the flesh torn from his thumb and finger, and a verdict for \$4,000 was held not to be excessive. In the case of *Railway Co. v. Young*, 19 Kan. 493, a verdict of \$10,000 was decided not to be excessive for the amputation of a hand. As has been repeatedly said, this is a question peculiarly within the jury's province to determine, and only where it is made to appear that they have abused the discretion lodged in them will their action be set aside on this ground. We think there is no error in the judgment, and that it should be affirmed.

Excessive
damages.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is affirmed.

Interchange of Traffic—Duty to Block Frogs—Employee of Connecting Company.—Where two railway companies have an arrangement by which they receive cars over a delivery track at a certain point, a person employed by one of them to take the number of its cars and inspect the seals as trains are made up at such place by the other, is an employee of the latter within the meaning of the Ohio Act of March 23, 1888, for the protection of railroad employees, which requires every railroad in the state "to adjust, fill or block the frogs, switches and car rails on its track * * * so as to prevent the feet of its employees being caught therein." *Atkyn v. Wabash R. Co.* (Ward, Intervenor), 41 Fed. Rep. 193.

Same—Negligently Leaving Cars on Track of Connecting Company—Liability.—Where two railroads have a traffic arrangement for the interchange

of cars, and one sets loaded cars upon the track of the other at an unusual hour of the night, and does not give notice or put out warning signals, it is liable in damages for the death of an employe of the other company who is killed in a collision with the obstruction. And under such circumstances, it would appear that the other company is also liable on the ground that every railroad company owes to its employes whose lives are at stake, a clear and unobstructed track for every train or car it puts in motion and orders on the rails with the assurance that there is a clear track, or on the ground that by the traffic arrangement for interchanging cars with another company, the other company is only its agent or servant in the use of the track and management of the business, the employes guilty of the negligence being *pro hac* its own employes. *Lockhart v. Little Rock & M. R. Co.*, 40 Fed. Rep. 631.

Injuries to Employe—Evidence of Ownership.—Where the plaintiff sues for injury caused by the negligent management of a railroad, or negligent construction thereof, it makes a sufficient *prima facie* case against the defendant to show that it was the owner of the railroad without proving affirmatively that the persons in charge were its servants or employes. *Davis v. Button*, 78 Cal. 247.

Damages for Personal Injuries—Excessive Verdicts.—A court cannot interfere with a verdict on the ground of excessive damages, unless such damages are so excessively large and disproportionate as to warrant the inference that the jury was swayed by prejudice, preference, partiality, passion, or corruption. *Shumacher v. St. Louis & S. F. R. Co.*, 39 Fed. Rep. 174.

In an action to recover damages for the death of plaintiff's son, it appeared that the son was industrious, economical and temperate, and that at the age of 26 years he was earning \$1,000 a year, out of which he was furnishing towards the support of his mother, the plaintiff, who was then 51 years of age, \$200 per annum. *Held*, that a verdict of \$4,200 was not so excessive as to require a reversal. *Texas & P. R. Co. v. Lester*, Tex. Sup. Ct., Nov. 8, 1889.

The testimony showed that plaintiff's left thigh bone was badly fractured and the knee joint stiffened so as to be immovable; that he was prevented from following his trade as a plumber or any kind of manual labor requiring any active use of the limbs; that he suffered great pain which could only be remedied by a surgical operation at a great risk of his life. The medical testimony was to the effect that the pain could not be alleviated except by means of the operation referred to. Plaintiff was compelled to walk with the aid of crutches, and he described his mental and physical pain as great. *Held*, that a verdict for the sum of \$12,000 was not so disproportionate to the injuries sustained as to justify the court in setting it aside. *Texas M. R. Co. v. Douglass*, Tex. Sup. Ct., March 19, 1889.

Plaintiff was but 19 years old at the time of the accident, and was a strong, active young man. The injury caused him excruciating pain for a long time. He had been compelled to submit to a surgical operation, by which a portion of the ankle bone was removed. The joints of his ankle and foot were stiffened, and he had become a cripple for life. He was a laborer, and was neither qualified nor fitted for other pursuits, and his ability to labor in any vocation to which his qualifications adapted him, was greatly impaired. *Held*, that a verdict for \$8,000 was not excessive. *Henry v. Sioux City & P. R. Co.*, 75 Iowa 84.

In an action for damages for the death of a husband and father, the jury returned a verdict of \$10,000. The deceased was a laborer aged about thirty-five years and earning a \$1.25 a day. The evidence showed that he was stout, healthy and sober. *Held*, that the verdict was not excessive. *Missouri Pac. R. Co. v. Lehmborg*, Tex. Sup. Ct., Nov. 8, 1889.

Plaintiff received a gaping wound about two inches long and three or four inches deep in his side above the hip. The wound proved to be serious and permanent. He suffered therefrom from December, 1882, to the trial of the case in January, 1889, and his health was entirely destroyed. *Held*, that a verdict for \$9,000 was not excessive. *Western & A. R. Co. v. Lewis*, Ga. Sup. Ct., Jan. 8, 1890.

Same—Death of Son—Elements of Damage.—Under Tex. Rev. St., art. 2909, which authorizes the maintenance of suits "for injuries resulting in death," and provides that "the jury may give such damages as they may think proportioned to the injury resulting from such death, the jury may, in an action by a father to recover damages for the death of his son, consider the circumstances of the son, his occupation, age, health, habits of industry, sobriety and economy, his skill and capacity for business, the amount of his property, his annual earnings, and the probable duration of his life, and they may also consider the reasonable expectation which the plaintiff had resulting from his condition, and the disposition and ability of his son during his life to bestow upon him pecuniary benefit as of right, or in obedience to the dictates of filial duty without legal claim. *Hall v. Galveston, H. & S. A. R. Co.*, 39 Fed. Rep. 18.

Same—Reading Authorities in Presence of Jury.—In an action for negligently causing the death of an employe, it is not such an abuse of judicial discretion as to require the reversal of a verdict for the plaintiff, to allow the plaintiff's counsel in the presence of the jury, to read authorities to the court, showing verdicts for \$15,000 and \$10,000 against railroad companies. *Missouri Pac. R. Co. v. Lamothe*, Tex. Sup. Ct., Feb. 14, 1890.

FORD

v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO.

(*New York Court of Appeals, November 26, 1889.*)

Fellow-Servants—Injury to Switchman—Negligence in Loading Car.—Cars known as gondola cars, generally used for carrying coal, and which had boxes from 18 to 24 inches high, were loaded with lumber. The company had furnished suitable stakes which could have been properly fastened inside the boxes. Where the ends of the boxes were stationary one end of the timber was laid down in the bottom of the car, and the other end projected over the end of the box in cases where the timber was longer than the box. The lumber was piled, after it reached the top of the box, so that one piece overlapped another, the pile thus constantly growing narrower across the top. The cars were loaded under the direction of a foreman of great experience, and although they were not regular lumber cars, they were very much used for carrying lumber for short distances. Plaintiff's intestate, a switchman, was injured by the lumber on one of the cars falling upon him. The cars had been properly inspected, before being sent out, by competent and proper inspectors. *Held*, that the sole cause of the accident was the improper loading of the car through the failure of the employes to use the stakes furnished by the company, and that these employes were the fellow-servants of the deceased for whose carelessness the defendant was not responsible.

RUGER, C. J., and DANFORTH and ANDREWS, JJ., dissent.

41 A. & E. R. Cas.—24

APPEAL from General Term of the Superior Court of Buffalo.

Action by Emily Ford, administratrix of the estate of George Ford, deceased, against the Lake Shore & Michigan Southern R. Co., for negligently causing the death of plaintiff's intestate. A verdict was returned for the plaintiff. The defendant moved for a new trial, and the motion was heard on case and exceptions at the general term in the first instance and denied. The defendant appeals.

James Fraser Gluck for appellant.

Tracy C. Becker for respondent.

EARL, J.—This action was brought by the plaintiff to recover damages for the negligent killing by the defendant of her intestate, a switchman in its employ. In her complaint she based her charge of negligence mainly upon the following grounds: The running of an unsafe and unsuitable car; the careless and negligent loading of the car without fastening the timbers securely thereon; failure to properly inspect the car by proper and competent inspectors; and failure to provide proper and suitable rules for the government, control, and instruction of its employes.

The material facts, as they appeared upon the trial, are as follows: On the 29th day of May, 1887, the Buffalo Car Manufacturing Company sent to the defendant's docks,

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on the Hamburg canal, nine cars to be loaded with heavy timber and car-sills taken from canal-boats. The cars were what are known as "gondola cars," generally used for carrying coal, and had boxes from 18 to 24 inches high. They were not regular lumber cars, but were very much used upon all the roads, running in and out of Buffalo, for carrying lumber. Regular lumber cars are flat cars, with iron brackets on the sides, into which are placed stakes for the purpose of holding the lumber in place. These cars had no brackets on the sides for stakes, and there was nothing but the boxes to hold the lumber. On some of the cars the ends of the boxes dropped down, and on others they were, like the sides, fixed and stationary. The lumber was placed inside these boxes, and where the timbers were longer than the cars, and the ends dropped down, it was loaded flat; and on the cars where the ends of the boxes were fixed and stationary one end of the timber was laid down on the bottom of the car, and the other end projected over the end of the box, in cases where the timber was longer than the box. The lumber was piled, after it reached the top of the box, so that one piece overlapped another, the pile thus constantly growing narrower towards the top. On some of the cars the lumber was piled

a foot and a half higher than the boxes. The car from which the lumber fell upon the intestate was one upon which the ends of the boxes were fixed and stationary, and the timbers projected over one end. Thin strips of board had been nailed to the sides of the box, as it is claimed by the plaintiff, to hold the timbers on the car; but, as claimed by the defendant, and proved upon the trial, they were simply guides in piling the lumber, and were placed there for that purpose; and the lapping of the timber, one piece upon another, receding from the sides, was relied upon to keep the pieces in place. The nine cars were loaded by the employes of the defendant in charge of and under the direction of a foreman of great experience, who had been engaged in loading and handling cars for eight or nine years. This lumber was to be drawn about a mile, simply from one part of the city to another. The cars, all loaded in the same way, at the same time, all went safely, except the one from which the lumber fell upon the plaintiff's intestate. After the cars were loaded they were carefully inspected by two foremen, and they considered them safely and properly loaded. Gondola cars, like the ones in question, were very generally used for the transportation of lumber for short distances, and these cars were loaded as such cars usually were for that purpose. The court charged the jury that there was no evidence that the defendant was called upon to establish any system of rules which should provide for any different or safer method in the loading of the lumber than the method described by the witness Davis, defendant's foreman, as in use by it. We think that charge was correct, but, whether it was or not, the plaintiff is not in a position to complain of it, and the question of suitable rules is therefore out of the case.

There is no question, upon the evidence, that the two foremen who inspected and superintended the loading of these cars were perfectly competent men, and, therefore, it cannot be said that the defendant failed to provide competent and proper inspectors. The only ground of negligence, therefore, remaining to be considered is whether the defendant furnished suitable cars and appliances. There can be no question that this was a suitable car. It did not break. It was strong and capable of holding timbers, and such cars were generally used for that purpose. It is entirely plain that the sole cause of the accident was the negligent and improper loading. The defendants having furnished the cars, the employes should have placed the long timbers on those cars which had movable ends to the boxes, so that the timbers could be laid down flat, and when they placed the long timbers in the particular

Negligence in
loading car—
Fellow-serv-
ants.

car from which the accident came they should not have piled them up so high as to make the pile dangerous. There was no emergency or necessity for putting a high pile of timbers upon any one car to be drawn the short distance. But, if the employes desired to put a high pile of lumber upon any one of these cars, it is undisputed that suitable stakes had been furnished by the defendant to put inside the boxes, where they could have been properly fastened, and thus have held the lumber as securely as if piled upon platform cars with iron brackets upon the sides and stakes placed therein.

It is too obvious for dispute that the sole cause of this accident was the improper loading of the car, and that if the employes of the defendant had properly loaded it, and made proper use of the stakes and materials the company had furnished, the accident would not have happened. These employes were the co-employes of the intestate, and for their carelessness the defendant is not responsible. In the case of *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374, the plaintiff, a brakeman on a car loaded with lumber, was thrown off from the car because an imperfect stake broke while the car was in motion, and he was thus injured; and it was held that the defendant was liable on the ground that it had not furnished any stakes for holding the lumber in place after it was put upon the car. The main features of that case are, therefore, unlike those which exist here. This case bears some resemblance to the case of *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251, where a brakeman upon a lumber car was injured because it was improperly loaded; and it was held that the defendant, having provided a safe car, and a safe system, and competent men to inspect it, was not responsible for the negligence of co-employes in the performance of their work. We are, therefore, of opinion that upon the defendant's motion the court should have directed a verdict in its favor, and the judgment should therefore be reversed, and a new trial granted, costs to abide event.

FINCH, PECKHAM and GRAY, JJ., concur.

DANFORTH, J., (*dissenting*).—At the close of the evidence the defendant's counsel asked the court to direct a verdict, upon the grounds—"First. There is no evidence whatever of the defendant's negligence. Second. On the ground of the plaintiff's contributory negligence. Third. That, even assuming that the duty in this case was one to be performed by the master, there is no evidence that, under the circumstances in this case, the ordinary care required of the master had not been exercised on this occasion." At the close of the case numerous exceptions were taken to the charge as made,

and to the refusal of the learned judge to charge as requested by the defendant's counsel. The plaintiff had a verdict, and the exceptions were ordered to be heard at the general term in the first instance. They were there overruled. The opinion then rendered seems to be abundantly sufficient to sustain that result, and I am unable to find in the argument submitted to us in the interest of the railroad company any reasons sufficient in law for the reversal of the judgment which the supreme court ordered.

The first point made by the appellant is that the trial court erred in refusing to direct a verdict for the defendant. The plaintiff's intestate was a switchman. While performing his duties as such, several sticks of timber from 26 to 30 feet in length, and from 5 to 12 inches thick, part of the load of a passing car, fell from it and upon him, crushing him so that he died. This car was for all legal purposes the car of the defendant, employed by it in its business, and for its management the defendant is to some extent responsible. The law casts upon it a certain duty, and it is for the interest and safety of the community that the defendant be held to its performance. Was there evidence of negligence on its part? It was held in *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374, not by way of formulating any new rule, but by application of a very old one, that it was the duty of the company as master to fit or prepare its cars for the use for which it was designed. There the company had furnished a platform car without stakes or sides, and through the imperfection of the stakes finally provided its servant's death was caused, and for that the defendant was required to make compensation. The same rule applies here. It was within the province of the master to furnish a suitable car for the carriage of lumber; and the proposition may be more specific,—it was the duty of the master to furnish a car suitable for the carriage or transportation of that particular load of lumber.

Duty of master to furnish suitable car.

The concession of the defendant is that the "car was not what is known as a regular 'lumber-car.'" It was in fact a gondola or coal car. It is also a statement of the defendant that "a regular lumber-car is a flat car, having brackets upon its sides, into which stakes from three to six inches thick are driven, and inside of those the lumber is laid." It is, of course, obvious that the height of the stake or other protection is an important consideration, and must govern the height of the load. The car in question also had brackets on the side, but they were not empty, nor were they designed for stakes. They were to receive the post or bar to the box frame, which was from 18 inches to 2 feet high. Above that, of course,

the sides of the car furnished no protection. It appeared, however, that this frame went round the car, at the end as well as at the sides, and that, owing to the greater length of the timber, one end of some of the pieces was necessarily put in the car, and the other projected over the end of the car slanting. It also appears that the load was higher than the sides of the car and was not staked. It could not be staked, because no brackets were provided, and the only way the timber was secured from outward force was by nailing some sticks on the inside of the car-box, neither fastening them to each other nor overhead. They were not intended as protection, but as guides, and the defendant's foreman testified that the security relied upon was from the different widths of the timber, and so from "one piece overlapping the other."

We have, then, a case precisely within the principle of the Bushby Case, *supra*. Here the car above the sides of the box was unprotected, and no means of protection afforded,—no brackets within which stakes could be placed; but, more than that, the car was an unusual one for the purpose to which it was applied, and for which the company furnished it. If it was so managed as to give equivalent security to the employe, it was for the jury to find that out. From the face of the record it might appear that the dangerous machine was sent upon the track without a thought or care for the safety of those whose duty as employes might bring them to it, or of the traveler whose journey would lead him near its course. The trouble was not in the manner of loading, but in the construction of the car, which made any other manner impossible. As the load rose above the box, every timber had at once leaned towards the ground, and by its own gravity gave effect to each jar or concussion. It was not from the omission of stakes, but from the absence of brackets to receive them. The defect was structural, and the omission corporate. It is enough for us to say that if there was any question it was one for the jury, and that the court committed no error in refusing to take it from them.

As to the exceptions to the judge's charge: (1) It was not necessary for the court to say that any of the defendant's servants "were competent for the work assigned
Exceptions to charge. to them." It was enough to say, as the judge is conceded to have said, that there was "no evidence that they were not competent." I am unable to discover any ground upon which the defendant could justly call for an affirmative opinion or declaration from the court. (2) The learned counsel for the defendant asked the judge to charge: "If the jury believe that these cars were carefully inspected, before they started and prior to the accident,

by competent inspectors, and the method in which they were loaded and the load secured, was by them adjudged to be a safe and proper one, then the defendant cannot be held guilty of negligence," and he declined to charge differently than he had already charged. The court had properly referred to the grounds on which the defendant's liability depended, and was not bound to accept the measure proposed by counsel. It omitted elements of the greatest importance, and, if adopted, would have tended to exclude from the consideration of the jury the corporate negligence of the defendant in omitting, among other things, to furnish proper cars, and would have turned their attention from the master's acts to those of his servants. (3) The next point involves a like defective proposition. The defendant asked the learned trial judge to charge the jury: "If the defendant furnished suitable appliances for the loading and unloading of lumber, and employed competent and proper persons to load the cars, and the injury resulted from the neglect or failure of persons so employed to use such appliances or properly load the car, then the plaintiff cannot recover;" and the court responded in the same manner. The proposition is confined to the loading and unloading of the car either by appliance or laborers, and excluded entirely the construction of the car and its capacity to receive loads of this nature. Every fact suggested by the defendant's proposition might be true, and yet the plaintiff recover because the defendant had not furnished "a safe, suitable, and proper car" for such a load, or the application and use of such appliances and workmen. A trial judge must be left to the exercise of some discretion as to the considerations suggested by the evidence and the language in which he will communicate them to the jury. He cannot be called upon to turn the case one way or the other upon isolated points of inquiry, and he fails in no duty when he submits in a fair and impartial manner the whole matter in controversy to the jury as the constitutional and final judge of the facts. This was done in the case before us. I think the general term properly disposed of the exceptions. The judgment appealed from should therefore be affirmed.

RUGER, C. J., and ANDREWS, J., concur.

Negligently Loading Car—Motion for Non-Suit—Responsibility of Company.—In an action against a railroad company to recover damages for injuries to a servant, caused by the improper manner in which a car was loaded, a motion by the defendant for a non-suit on the ground that there was no evidence of negligence on its part, sufficiently raises the point that the company was not responsible for the loading of the car, when the plaintiff's evidence shows that the car was improperly loaded. *Byrnes v. New York, L. E. & W. R. Co.*, 113 N. Y. 251.

DOYLE

v.

ST. PAUL, MINNEAPOLIS & MANITOBA R. CO.

(Minnesota Supreme Court, November 22, 1889.)

Evidence—Declarations of Agent of Company—Admissibility.—The plaintiff, an employe of a railroad company, having been injured while coupling cars, an agent sent by the company to obtain from the plaintiff a statement of the circumstances of the accident is not authorized by such agency to bind the company by his own declarations as to such circumstances. Proof of such declarations would be mere hearsay evidence.

Master and Servant—Use of Old Rails for Side Tracks—Evidence of Custom.—The issue being as to whether the conduct of a railroad company not obviously dangerous and culpable (the use of partially worn rails for side tracks at a railway station) is negligence, proof may be made that the conduct in question is in accordance with the general custom of others (railroad companies) under like circumstances.

Same—Defective Rail—Evidence.—The question being whether the plaintiff's foot was caught by a splinter on the inside of a railroad track or rail, and as to whether the defendant is chargeable with negligence therefor, danger from such cause not being self-evident, it is competent for the defendant to show by experienced witnesses that such accidents have been unknown.

Same—Defective Rail—Notice of Defect.—Liability for an accident from such a cause is not established, unless it is shown that the defendant had notice of the defect, or that in the exercise of reasonable care the defendant should have known it, or should have apprehended it, and that it was dangerous.

Same—Assumption of Risk—Knowledge of Defect.—A servant who knows the condition of the appliances or place in connection with which he is employed, or who in the exercise of ordinary observation ought to have known, and who knows, or ought to have known, the danger to which he may be thereby exposed, is to be deemed, in general, to have taken upon himself the risk.

Same—Cause of Injury—Negligence.—The plaintiff claiming to have been injured (run over) by reason of having his foot caught by a splinter in the rail while coupling cars, and complaining also that the freight on one of the cars (railroad iron) had been negligently suffered to project over the end of the car, *held*, that a recovery could not be had for the latter cause, the plaintiff not having been injured thereby.

APPEAL from District Court, Kandiyohi County.

M. D. Grover and J. W. Mason for appellant.

Benton, Plumley & Healy for respondent.

DICKINSON, J.—This action is for the recovery of damages for a personal injury suffered by the plaintiff while engaged in the discharge of his duty as a switchman in the defendant's service at one of its railroad stations. The accident occurred in connection with an attempt by the

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plaintiff to couple a slowly-moving platform or coal car to a caboose or box-car on a side-track within the depot grounds. The coal-car was loaded with steel rails, which, in the course of transportation, and from the motion and shocks to which cars are ordinarily subjected, had so changed their proper position as to project beyond the end of the car. This was known to the plaintiff when he undertook to make the coupling. It is a common occurrence in the transportation of such freight. As the cars came together the projecting rails so covered the draw-head of the box-car that the plaintiff was unable to insert the coupling pin into its proper place, so as to make the coupling. The plaintiff was in a stooping posture, to avoid being caught between the ends of the projecting rails and the box-car. Being unable to effect the coupling, he attempted to get out from between the cars. In doing so, his foot, as the evidence discloses, was caught on the inside of the rail, and held fast, so that he could not extricate it, and the moving car ran over the leg. The theory of the plaintiff is that his foot was caught by a projecting sliver or splinter of iron from the inside of the rail, and one of the principal grounds of negligence alleged in the complaint was that the defendant had placed a worn out and splintered rail in this side track, and had allowed the same to remain there. This was an important issue in the case: for, while there was no direct evidence of the existence of a splinter in the rail at the place of the accident, there was evidence that something inside the rail caught the plaintiff's foot and held it fast; that this side track was composed of iron (not steel) rails, somewhat worn; that such rails do become splintered from use, although steel rails do not; and that this side track was observed, some time after the accident, to be splintered inside the rails. On the other hand, there was evidence on the part of the defendant that splinters could not remain on the inside of the rail, for the reason that they would be cut off or pressed down by the flanges of the wheels, and that the inside of a rail wears smooth.

A few days after the accident the yard-master at this station, one Krukenberger, acting in behalf of the respondent, as may be assumed, obtained from the plaintiff a statement of the circumstances of the occurrence. A person who was present when this statement was received was called as a witness for the plaintiff, and allowed to testify that Krukenberger then stated that "the rail was splintered." This was erroneous evidence, bearing upon a material issue in the case. It was not shown that as yard-master Krukenberger's duties pertained to the condition or repair of the roadbed or tracks in the yard, and

Declarations
of agent—
Admissibility.

it was afterwards shown, indeed, that they did not. The fact that Krukenberger may have been authorized by the defendant merely to go to the plaintiff, and obtain from him a statement of the facts attending the injury, he thus being the defendant's agent for that purpose, did not render competent as evidence any statement or admission concerning the matter here in issue which Krukenberger may have then made. That was no part of his agency, and had no necessary or proper relation to the business committed to him to do. It should not have been received as an admission of a fact binding the defendant. The evidence, as bearing upon the fact in issue, was mere hearsay.

It appearing that the defendant had taken partially worn rails from its main track, and put them in the side tracks at this station, the defendant offered to prove that this was a general and universal custom of other railroads throughout the northwest. The proof was excluded. This evidence was admissible to rebut an inference of negligence, in view of the nature of the subject to which it related. *Kolsti v. Minneapolis & St. L. R. Co.*, 32 Minn. 133. From such a use of old rails the conclusion of negligence does not follow as a matter of course. Whether it should be regarded as negligence was so doubtful, and the subject was so far removed from the common knowledge and experience of the jury, that the defendant was entitled to show that its conduct in this respect was in accordance with that of all others engaged in the same business. That would be proper for the consideration of the jury, in determining whether the defendant had exercised such care as ordinarily prudent men are accustomed to exercise under like circumstances.

A question somewhat akin to this is presented upon the refusal of the court to receive the testimony of a witness for the defendant, who had had 23 years' experience in railroad operation, and by whom it was proposed to show that he never heard of an injury to a railroad employe from a sliver projecting from the inside of a rail. In *Phelps v. City of Mankato*, 23 Minn. 276, 279; *Kelly v. Southern Minn. R. Co.*, 28 Minn. 98, 6 Am. & Eng. R. Cas. 264; and *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 11 Am. & Eng. R. Cas. 168—it was held that evidence was not admissible showing that other accidents had occurred from the same defect or negligent cause complained of. Such evidence should probably only be received where there is doubt as to the existence of the defect complained of, or where the dangerous character or nature of the thing complained of would not be obvious

Use of worn rails for side tracks—Custom.

Evidence that no similar accident ever known to happen.

as a matter of common knowledge and experience. If such evidence is admissible to show that what is complained of was of a dangerous character, it must be that evidence would be admissible on the other side to show that in a long and constant use of such instrumentalities accidents had been unknown. That would be a proper means of showing that a thing which was not obviously dangerous was not in fact so. We think that the evidence should have been received.

In this connection, however, we will add that, even in the absence of such evidence, we are of the opinion that unless upon another trial there shall be other evidence, going to charge the defendant with negligence, a recovery cannot be sustained. Upon the case here presented it would seem that an injury from such an extraordinary cause as a splinter, such as could have remained projecting from the inside of a track along which the flanges of the wheels run, was not to have been anticipated by the defendant as likely to occur, and hence the failure to guard against it would not be negligence. For the reasons already assigned, a new trial must be allowed.

Evidence of
negligence.

Some other questions are presented, based upon the charge of the court, and upon its refusal to charge as requested, to which, in view of another trial, we should refer, although we may do so in general terms, and without calling attention to the particular form of the charge as given or of the requests refused.

It is necessary to a recovery for the defect in the rail that the defendant be shown to have had notice of the defect, or that in the exercise of reasonable care it should have known it, or should have apprehended that such or like defects might occur, and that they would be dangerous. If the plaintiff knew, or by the use of ordinary observation and care ought to have known, that the defendant's side tracks at this station were composed of rails so worn and splintered as to be dangerous, he would be deemed to have assumed the risk incident thereto, if he also knew and appreciated (or ought to have done so) the nature and extent of the danger. *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, and cases cited; *Wilson v. Winona & St. P. R. Co.*, 37 Minn. 326, 31 Am. & Eng. R. Cas. 244, and cases cited; *Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137.

Knowledge of
defect.

Adverting briefly to the subject of the projecting rails on the car, to which much attention was given both in the court below and in the argument of this appeal, it may be assumed, in the present aspect of the case, that the defendant was negligent in putting this car into the train at Willmar without embracing the opportunity, afforded by the necessary deten-

tion of the car there for repairs, to readjust the rails. Still, for that cause a recovery could not be had, under the case as now presented, for the plaintiff knew the facts in that regard. Such displacement of such freight appears to be a common occurrence, naturally resulting in the course of transportation, and we see no reason to doubt that he must be deemed to have taken upon himself the risk; so far as the danger from that cause was obvious. However that may be, he was not injured by the projecting rails. We perceive no such proximate relation between the projecting rails, of which the plaintiff had notice, and the peculiar accident from a splinter in the track, as would justify a recovery based upon the alleged negligence in respect to the projecting rails. In the present aspect of the case it would seem that if a recovery can be sustained it can only be upon a finding of negligence in respect to the splinter in the rail, and that the injury proceeded from that cause. Nevertheless the fact as to the projecting rails may be not without importance, as an incidental circumstance explaining and justifying the posture and movements of the plaintiff in his attempt to couple the cars. Order refusing a new trial reversed.

**Negligence
in allowing
rails to pro-
ject.**

Injuries to Employee—Splint Projecting from Rail.—See *Pittsburgh, C. & St. L. R. Co. v. Adams* (Ind.), 23 Am. & Eng. R. Cas. 408.

Construction of Side Tracks—Duty of Company towards its Employees.—Plaintiff's intestate, a freight conductor in the employment of the defendant, was killed in a collision between the freight train in his charge, and a freight car which had drifted from a side track. The court against the objection of the defendant, permitted evidence as to the defective construction of the side track and the failure of the defendant to employ stop blocks or proper means for blocking the cars when upon the side tracks, to be introduced. The jury were instructed that they must say "whether the siding was constructed in accordance with scientific railroad construction, and whether its construction, with respect to the stop-blocks, or securities against a car being blown out upon the main track, the company exercised ordinary care." *Held*, that as there was no question as to the side track having become defective after its construction, but the question being whether the company exercised ordinary care in its construction and whether it was constructed according to scientific principles, the instruction was erroneous, there being no rule of law restricting the company in the manner of constructing its side tracks where the safety of passengers and of the public is not involved, and the hazards incidental to such tracks as constructed, being assumed by the brakemen and others employed thereon. *Twitchell v. Grand Trunk R. Co.*, 39 Fed. Rep. 419; following *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189.

Evidence—Admissibility—Narrow Escape of Another Employee.—Where a plaintiff sues to recover damages for negligently causing the death of a track repairer who was run over by a switch engine, evidence is admissible that another man who was working close to him came so near being run over that the engine struck his foot, for the purpose of showing that the peril of the deceased was not brought about by his own negligence. *Missouri Pac. R. Co. v. Lehmborg*, Tex. Sup. Ct., Nov. 8, 1889.

Switching—Use of Engine with Square instead of Sloping Tank.—Where plaintiff's husband was run over by a switch engine, she may introduce testimony to show that the engine in question, which had a square tank would have been safer if it had a sloping tank, and evidence that engines with sloping tanks were used by the company in one of its yards is admissible for the purpose of showing knowledge of the fact that such engines were safer. *Missouri Pac. R. Co. v. Lehmberg*, Tex. Sup. St., Nov. 8, 1889.

Evidence—Res Gestae—Statement of Track Walker to Section Boss.—Plaintiff's son, a locomotive engineer, was killed by the overturning of the engine and cars at a point where the roadbed was worn and weak, and the track was out of line. A witness for the plaintiff testified that he was present where the section men were at work on the section where the accident occurred; that the track walker came up, and the section boss or some of his men asked him how things were down below; that he replied that they were all right except that the track was spread at the place where the accident occurred, and that the section men had better look after it. *Held*, that as the statement was the statement of a servant of defendant whose duty it was to ascertain the condition of the track and report to other servants, whose duty it was to repair it, the statement was part of the *res gestae*, and admissible. *Texas & P. R. Co. v. Lester*, Tex. Sup. Ct., Nov. 8, 1889.

Derailment—Pleading and Proof—Defective Track—Low Joint.—Plaintiff, an engineer, sued to recover damages for injuries sustained through the derailment of his engine. The petition charged that the derailment was caused by defendant's failure to keep its track at the place where it occurred in proper repair, and failing to cause the same to be properly guarded and inspected, and by permitting its roadbed at said place to become and remain out of repair; that the ties upon which the rails rested were old, rotten and worthless; that the rails were insufficient and improperly laid and fastened so that they spread when the engine ran on them, and that defendant had failed to have its track inspected. *Held*, that the allegations were sufficiently broad to admit evidence upon the question whether a low joint was calculated to cause the derailment of the engine. *Fort Worth & D. C. R. Co. v. Thompson*, Tex. Sup. Ct., June 28, 1889.

Same—Evidence—Testimony of Person Employed in Construction of Road.—Plaintiff sought to recover damages on the ground that the derailment of his engine was caused by the negligence of the defendant in failing to keep its roadbed in repair, whereby the rails spread. *Held*, that the fireman on the engine at the time of the accident, who had helped to construct the road, might testify that the track was liable to "get out of line" at that point by reason of rain. *Fort Worth & D. C. R. Co. v. Thompson*, Tex. Sup. Ct., June 28, 1889.

Same—Evidence—Opinion of Brakeman.—A brakeman, who had been employed as such for 10 years and who was on the train at the time of the derailment and investigated the cause of the accident at the time when it occurred, may competently give his opinion as to the cause of the derailment. *Fort Worth & D. C. R. Co. v. Thompson*, Tex. Sup. Ct., June 28, 1889.

LAKE SHORE & MICHIGAN SOUTHERN R. CO.

v.

STUPAK.

(Indiana Supreme Court January 7, 1890.)

Master and Servant—Retention of Incompetent Person—Pleading—Knowledge of Incompetency.—When the plaintiff sues to recover damages for injury caused by the negligence of the engineer upon the construction on which he was employed, and alleges that the defendant retained the engineer in its employ with knowledge of his carelessness and incompetency, he need not state in his complaint the name of the officer or officers to whom he expects to bring notice to the defendant of the negligent habits of his co-employee.

Same—Fellow-Servants—Retention of Incompetent Employee—Pleading—Demurrer.—Although generally an employer is not liable for the negligence of a fellow-servant, yet where the complaint alleges that the plaintiff who was employed upon a construction train, was injured through the negligence of the engineer of the train; that the engineer was habitually careless and negligent in the discharge of his duties; that the defendant had notice thereof but carelessly and negligently retained the engineer in his service, it is sufficient to state a cause of action and is not open to demurrer.

Same—Pleading—Knowledge of Incompetency.—Although such complaint does not allege that the plaintiff did not possess equal means of knowledge of the habits of the engineer with those possessed by the defendant, it is sufficient if it alleges that the plaintiff had no notice or knowledge of the engineer's negligent habits or conduct, but that the defendant had such notice and knowledge.

Special Findings—Submission of Draft—Objections.—When a draft of special findings is submitted by the plaintiff to the jury, to be signed and returned by it, if adopted and approved, the defendant has no right to object to the omission of facts material to the right of the plaintiff to recover. The proper course is for the defendant to submit a draft embracing such additional facts.

Master and Servant—Retention of Incompetent Employee—Evidence of Reputation.—Where the plaintiff's right of action is founded upon the retention of an engineer who was alleged to be habitually negligent and careless, evidence of the reputation of the engineer is admissible for the purpose of charging the defendant with knowledge of his habitual negligence and carelessness.

Same—Evidence—Admissibility of Deposition.—Defendant offered in evidence the deposition of a witness who testified that on one occasion he heard the plaintiff express the opinion that the engineer by his recklessness would kill all the men on the train. The plaintiff then asked him if that was the only time he heard him say anything about it. The witness replied that it was, but that "the other people talked with him." *Held*, that the statement that the other people talked with the plaintiff was properly stricken out, as there was nothing in the deposition from which the nature of the conversation with the other people could be ascertained.

Same—Knowledge of Fellow-Servant's Incompetency—Special Finding.—A special finding by the jury that the defendant "had sufficient and ample

means of knowing the habits and conduct " of an engineer whose carelessness was alleged to have caused the accident and that the defendant did have such knowledge before the date of the accident, is not sufficient to sustain a verdict for the plaintiff, as it does not show that the defendant had such notice in time to investigate and to discharge the engineer if necessary.

APPEAL from Circuit Court, Lake County.

Action for damages for personal injuries sustained by the plaintiff whilst in defendant's employ. The defendant appeals from a judgment for the plaintiff. The decision of the supreme court on a former appeal is reported in 28 Am. & Eng. R. Cas. 323.

John H. Baker for appellant.

E. D. Crumpacker for appellee.

COFFEY, J.—This was an action by the appellee against the appellant for personal injuries. The amended complaint was in a single paragraph, and, omitting the caption, is in the words and figures following:

"The plaintiff, John Stupak, for amended complaint, complains of the defendant, the Lake Shore & Michigan Southern Railway Company, and says that said defendant was, at the time of the commission of the grievances and happening of the injuries hereinafter mentioned, and still is, a railroad corporation, organized and existing under the laws of the state of Indiana, and owning and operating a line of railroad, which runs eastward from the city of Chicago, in the state of Illinois, and extends over and across the counties of Lake, Porter, and La Porte, in the state of Indiana; that said defendant, in the operation of its said railroad, has for the last four years run a certain locomotive engine and train of flat cars for hauling gravel, stone, slag, and other material along its said railroad, for the purpose of repairing its track; that from the 1st day of April, 1883, until the following September, said defendant used said engine and train of flat cars in hauling gravel, stone, and slag from a pit near a station on said railroad in Lake county, Indiana, known as 'Pine,' and distributing the same along said railroad in said Lake and Porter counties, and had employed as laborers on said train, and as track repairers in utilizing and disposing of the material so hauled upon and along the track of said train, a large number of men, to-wit, one hundred and thirty, who lived at various points along the line of said railroad, between said station of Pine and the city of La Porte, in said state of Indiana; that the agents and servants of said defendant, in charge of said train and said work, by direction of said defendant, would leave the flat cars in the pit at night, and take

Amended complaint.

the said locomotive engine and two cabooses or coaches, which the defendant had provided therefor, and convey the said laborers to their respective places of abode, and in the same manner convey them to their places of work every morning; that about thirty of said laborers were engaged during said time in raising and repairing the track, and the others, numbering about one hundred, worked on said train of flat cars, loading the same with gravel and other material at said pit, and riding on said train along the track, for the purpose of unloading said material; that it was the duty of said body of track repairers, under their employment, when called upon so to do by their foreman, to go upon said train, and assist in unloading the same; that said defendant had in its service and employment, on the 13th day of August, 1883, and for four months prior thereto, as engineer of the locomotive engine used to propel said train of cars upon said work, as aforesaid, one Walter Pool, who was habitually careless and negligent in the discharge of his duties as such engineer in running and operating said engine and hauling said train of flat cars, during all of said time, in this: that during said time said engineer habitually and generally ran and propelled said engine and train of flat cars at a high, unusual, and dangerous rate of speed, and habitually and generally carelessly and negligently started and stopped said engine and train of cars during said time with great, unusual, and dangerous suddenness, and habitually and generally, during all of said time, carelessly and negligently stopped and started said train of flat cars with great danger, without giving any signal or warning thereof whatever, and while laborers were engaged in unloading said train of flat cars, and was not possessed of sufficient skill to manage and operate said locomotive engine and train of flat cars in an ordinarily careful and prudent manner, of all of which said defendant had due notice long before said 13th day of August, as aforesaid, but carelessly and negligently retained said Pool in its service and employment as such engineer after such notice, and until the happening of the injuries hereinafter mentioned; that on or about the 25th day of July, 1883, the plaintiff entered into the service of said defendant as one of its track repairers, on the work hereinbefore mentioned, and he lived near Burdick station, along the line of said railroad, in said Porter county, and rode back and forth from his home to his place of work in one of the cabooses or coaches attached to said locomotive engine, and provided by the defendant for the purpose of conveying laborers to and from their places of work, as aforesaid; that at the time he engaged in the service of the defendant, as aforesaid, he was wholly unacquainted with said Pool, and had no notice or knowledge

whatever of his careless and negligent habits and lack of skill as an engineer, as aforesaid, or of his character or reputation as an engineer, or in any other capacity; that plaintiff continued in the service of the defendant, as aforesaid, and on the 13th day of August, 1883, he was ordered and directed by his foreman to go upon said train of flat cars, and assist in unloading the same; that said train was then standing still, with the locomotive engine attached thereto, under the control and management of said Pool, when plaintiff, pursuant to said direction from his foreman, as aforesaid, and as it was his duty to do, went upon said train of cars, and while standing on one of said cars, shoveling off material in the line of his duty, as such servant of said defendant, and without any fault and negligence upon his part, said Pool carelessly and negligently, and without giving any signal or warning whatever, suddenly put said engine and train of cars in rapid motion, whereby the plaintiff was thrown off his feet, and fell between two of said cars, and was run over and cut, bruised, and mangled, and had his arms crushed and broken, so that he was permanently disabled, and wholly and permanently lost the use of both his arms, and was by such injuries rendered sick and sore, and for a long time his life was despaired of; that he suffered great bodily and mental pain and distress from his said injuries, and expended a large sum, to-wit, four hundred dollars, for medical services and nursing, in attempting to cure himself thereof; that he was, at the time of receiving said injuries, in the enjoyment of good health, and was earning one thousand dollars per year, but on account thereof had not been able to do any kind of labor since, and is unable even to feed himself, or attend to his personal wants, and will remain permanently in such helpless condition—all to his damage of twenty thousand dollars."

Plaintiff further says that at the time he went upon the train of cars to assist in unloading the same, on the 13th day of August, 1883, as aforesaid, he had never been on said train of flat cars but once before, and then for a few minutes only, and he had no notice or knowledge whatever of the careless and negligent habits of said Pool in handling and running said engine and train of cars, and had no notice or knowledge whatever of the character or reputation of said Pool as such engineer, or in any other capacity; that said injury occurred wholly without the fault or negligence of plaintiff, but was caused by the carelessness and negligence and want of skill of said Pool in managing said engine and train of cars as aforesaid, and by the negligence and carelessness of the defendant in retaining said Pool in its service as such engineer after it had notice of his carelessness, negligence, and incompetency

as aforesaid. Wherefore plaintiff asks judgment for \$20,000, and other proper relief.

The defendant filed a motion in writing, asking the court to require the plaintiff to make his amended complaint more certain and specific, by stating the name or names of all officers and agents of defendant through whom he expected to bring notice to the defendant, or, if the plaintiff shows that he cannot ascertain and state the name or names of such officers and agents, that he be required to state what official position such officer or agent held, and in what manner he was employed. The court overruled the motion, to which ruling the defendant excepted.

**Motion to
make com-
plaint more
speciſic.**

The defendant demurred to the amended complaint for want of facts. The court overruled the demurrer, to which ruling the defendant excepted. The defendant answered in four paragraphs. The first was a general denial, and the others set up special matter. The paragraphs setting up special matter need not be further noticed, as the case was tried upon the issues raised by the general denial. There was a reply in denial to the second, third, and fourth paragraphs of answer.

Demurrer.

The trial was by jury. Under instruction of the court, they returned a special verdict, which omitting the caption, is as follows:

"We, the jury, having been instructed to return a special verdict in said cause, find the facts proven as follows:

"(1) The defendant, the Lake Shore and Michigan Southern Railway Company, is, and for the last ten years has been, all the time a railroad corporation, duly organized and existing under and by virtue of the laws of the state of Indiana, and during all of said time said defendant has owned and operated a line of railroad running and extending to the eastward from the city of Chicago, in the state of Illinois, and running and extending through and across the counties of Lake, Porter, and La Porte, in the state of Indiana.

**Special ver-
dict.**

"(2) On the 13th day of August, 1883, and for three months next before that date, the defendant ran and operated upon its said railroad a certain locomotive engine and train of flat cars, which were, at and during all of said time, used by said defendant in hauling and distributing stone and other material along the line of said railroad through Lake, Porter, and La Porte counties, in said state of Indiana, and which stone and material were during said time being used by said defendant in raising and repairing its said railroad track; that said defendant had in its service and employment during said time a large number of laborers, to-wit, about sixty, (60,) who worked

under the foremanship and direction of John Shifkoski, who was also in the service and employment of the defendant during said time; that said laborers were during said time employed in unloading said train of flat cars of such stone and material, while the same was being distributed along the track aforesaid, and such laborers were required to go and be upon said flat cars to perform such service; that during said time the defendant had in its service and employment also a number of other laborers, to-wit, about twenty, (20,) who were engaged in using said stone and material in raising and repairing the defendant's said railroad track, which last named laborers worked under the foremanship and direction of John Pickett, who was also in the service and employment of the defendant during said time; that said laborers, working under Shifkoski and Pickett as aforesaid, lived at various places along the line of said railroad between the city of La Porte, in La Porte county, and Pine Station, in Lake county, and when each day's work was done the servants of said defendant, in charge of said locomotive engine and train of cars, under instructions from the defendant, would leave the flat cars at or near the place of work, and carry and convey said laborers to their respective places of abode in two coaches or cabooses, provided by the defendant for that purpose, and which were drawn and propelled by said locomotive engine, used in running said train of flat cars, and by such means would convey them to their places of work every morning, said engine and coaches remaining at the city of La Porte at night.

"(3) That said defendant had in its service and employment on the 13th day of August, 1883, and for six weeks next before that date continuously, one Walter Pool, as engineer of said locomotive engine used in drawing and propelling said train of flat-cars and cabooses, as aforesaid, who then and there, during all of said time, had the charge, control, and management of said locomotive engine; that it was the duty of said Pool, as such engineer, to start and stop said train of flat-cars carefully, and to give, or cause to be given, signals of warning, either by sounding the whistle or ringing the bell upon his said locomotive engine, before starting said engine and train of flat-cars in motion, but during all of said time said Pool was in the habit of starting said locomotive engine and train of flat-cars, while engaged in said work, with unnecessary and dangerously sudden jerks, and without giving, or causing to be given, any signal or warning, either by sounding the whistle, ringing the bell, or in any other manner, and said Pool, during all of said time, was in the habit of starting said engine and train of flat-cars while hauling and distributing stone and material upon and along the defendant's rail-

road, as aforesaid, and while men were on said flat-cars, engaged in unloading the same, with unnecessary suddenness, and without giving, or causing to be given, any kind of signal or warning, and was so in the habit of starting said locomotive engine and train of flat-cars on the 13th day of August, 1883, and all the time for six weeks next before that date; that it was dangerous to the men working on and about said train to so start the same without giving, or causing to be given, any signal or warning, or to start the same with such suddenness.

"(4) That said Walter Pool, during all of said time, had sufficient skill and knowledge to properly discharge his duties as such engineer, but during all of said time he habitually failed and neglected to discharge such duties with that degree of care and caution which a man of ordinary care and prudence would have done under the same or similar circumstances; that during all of said time, to-wit, on the 13th day of August, 1883, and for six weeks next before that date, said Walter Pool was generally reputed and known to be habitually careless and reckless in the discharge of his duties as such engineer generally along the line of the defendant's said railroad, by and among the men who worked under the foremanship and direction of the said John Shifkoski, as aforesaid; that the defendant had sufficient and ample means of knowing the habit and conduct of said Pool, as such engineer, in the discharge of his duties, as aforesaid, before the 13th day of August, 1883, and we find that the defendant did have such knowledge before that date. We also find that at the time said Pool entered into the service of the defendant as an engineer, to-wit, in the year 1880, he was a reasonably careful, skillful, and competent engineer.

"(5) That on the 29th day of June, 1883, plaintiff was employed as a track repairer by the defendant; and entered into its service on its said railroad in using the stone and material distributed along the defendant's railroad, as aforesaid, and continued in such service as such laborer until the 13th day of August, 1883, working all of said time under the foremanship and direction of said John Pickett, except for four days at the commencement of his said service, when he worked under the said John Shifkoski at breaking and crushing stone; that during all of said time plaintiff lived in the country about one and a half miles from Burdick station, on said railroad, in said Porter county, and he got on and off the caboose train of the defendant, as aforesaid, in going to and returning from his work at said Burdick station; that by the terms of his employment it was the duty of the plaintiff to go upon and assist in unloading said train of flat-cars whenever his foreman directed him so to do.

"(6) That at the time plaintiff entered into the service of the defendant, as aforesaid, he had no knowledge whatever of the character of said Walter Pool as an engineer, or in any other capacity, or of his reputation as an engineer, or of his habits and conduct in the discharge of his duties as such engineer; that said plaintiff was engaged at said work of raising the track of the defendant's said railroad during its said service, and was not required to and did not go upon said flat-cars to assist in unloading the same, or for any other purpose, until the 13th day of August, 1883; that the plaintiff was engaged with the force of track repairers, as aforesaid, and did not meet or come in contact with any other servants of said defendant, except for about thirty minutes each morning and evening in riding to and from his place of work in one of the cabooses or coaches, as aforesaid; that during plaintiff's entire service he had no knowledge whatever, from any source, of the reputation or character of said Walter Pool as an engineer, or his manner and habits of starting said locomotive engine and train of flat-cars, and had at no time during his said service for the defendant any means of such knowledge.

"(7) That on the 13th day of August, 1883, while so in the service of the defendant, plaintiff was directed by his foreman to go upon said train of flat-cars to assist in unloading the same, and under such direction plaintiff went upon said train, and assisted in unloading the same, and while plaintiff was upon one of said flat-cars, engaged in the line of his duty, and immediately after said car was unloaded, and before plaintiff could or had time to secure a position of safety, said Pool, as such engineer, without giving or causing to be given any signal or warning by ringing the bell, or blowing the whistle, or in any other manner, started said locomotive engine and train of flat-cars in motion with great and unusual suddenness, and plaintiff was thereby thrown down on the railroad track, and run over by one of said cars, and his arms were cut, crushed, and broken, and permanently injured thereby; that at the time plaintiff went upon said car to unload the same, and at the time he was injured, he had no knowledge or intimation whatever of the reputation, character, or habits of said Pool as such engineer, and had no means of such knowledge; that at the time he was injured, and all the time before, the plaintiff was in the exercise of that degree of care and caution for his own safety that a man of ordinary prudence would have exercised under the same or similar circumstances.

"(8) That by reason of such injury plaintiff, although properly treated therefor, was rendered sick and sore, and was confined to his bed for one year, during which time he suffered

intense physical pain and mental anguish on account of such injuries, and his right arm was thereby rendered wholly and permanently useless, and his left arm was rendered permanently stiff at the elbow-joint, and plaintiff was by such injuries rendered wholly and permanently disabled from performing manual labor; that at the time of plaintiff's said injury he was twenty-nine years of age, and capable of earning four hundred dollars per year; that he was compelled to and did expend three hundred dollars (\$300) in medical treatment for his said injuries; that plaintiff was damaged by such injuries to the amount of eight thousand dollars, (\$8,000.)

"(9) The foregoing are all the facts proven upon the trial of said cause. If, upon the foregoing facts, the law is with the plaintiff, we find for the plaintiff, and assess his damages at eight thousand dollars, (\$8,000;) but, if the law is with the defendant, we find for the defendant. JOHN P. MERRILL, Foreman."

Thereupon the defendant filed its motion for a *venire de novo*, assigning 12 reasons therefor. The court overruled this motion, and the defendant excepted. The defendant

Motion for a new trial.

then filed its motion for a new trial, assigning 43 reasons therefor. This motion was overruled by the court, and the defendant excepted. The plaintiff moved the court for judgment in his favor on the special verdict. The defendant orally moved the court to render judgment on said special verdict in its favor. The court overruled the motion of the defendant for judgment on said verdict, to which ruling the defendant excepted. The court sustained the plaintiff's motion for judgment on the verdict, to which ruling the defendant excepted; and thereupon the court rendered judgment for plaintiff for \$8,000 and costs.

The errors assigned are the circuit court erred—*First*. In overruling motion to make amended complaint more certain.

Errors assigned.

Second. In overruling demurrer to amended complaint. *Third*. In overruling motion for *venire de novo*. *Fourth*. In overruling motion for new trial. *Fifth*. In overruling defendant's motion for judgment on verdict. *Sixth*. In sustaining plaintiff's motion for judgment on the verdict.

Under the first assignment of error, it is claimed that the court should have required the appellee to state in his complaint the names of the officer or officers of the appellant through whom he expected to bring notice to the appellant of the negligent habits of the engineer in charge of the train upon which the appellee was injured. We know of no rule of pleading requiring such particularity, and it is evident

**Pleading—
Names of officers having
knowledge of
incompetency.**

that no good result would have been attained by sustaining the motion to make the amended complaint more specific. Had the appellee charged in his complaint that each and all of the officers of the defendant had notice of the negligent habits of Pool, the engineer, it would have been sufficiently specific, and yet the appellant would have had no more information as to the nature of the proof to be offered on the trial of the cause than it had with the complaint in the condition we find it. We do not think the court erred in overruling the motion to make the amended complaint more specific.

Nor do we think the court erred in overruling the demurrer to the amended complaint. It is true that the appellee and Pool, the engineer, were fellow-servants, and that

ordinarily the master is not liable to his servant for an injury occasioned by the negligence of a fellow-servant. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Bogard v. Louisville, E. & St. L. R. Co.*, *Id.* 491; *Robertson v. Terre Haute & I. R. Co.*, 78 Ind. 77, 8 Am. & Eng. R. Cas. 175; *Capper v. Louisville, E. & St. L. R. Co.*, 103 Ind. 305, 21 Am. & Eng. R. Cas. 525; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Brazil & C. Coal Co. v. Cain*, 98 Ind. 282. But it is equally as well settled that the master is bound to employ none but careful servants knowingly, and that, where he negligently employs a careless or negligent servant, or negligently keeps in his employment a negligent or careless servant after notice of such carelessness or negligence, he is liable to one of his servants injured by the negligence or carelessness of such servant. *Indiana Manuf'g Co. v. Millican*, 87 Ind. 87; *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, 5 Am. & Eng. R. Cas. 554; *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 352; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 12 Am. & Eng. R. Cas. 223.

Sufficiency of
complaint—
Retention of
incompetent
co-employee.

It is objected that the complaint does not allege that the appellee did not possess equal means of knowing the negligent habits of the engineer with those possessed by the appellant; but it is expressly alleged that the appellee had no notice or knowledge of the negligent habits or conduct of Pool, and that the appellant did have such notice and knowledge. The complaint, in our opinion, states a cause of action against the appellant.

Allegations as
to defendant's
means of
knowledge.

Under the fourth assignment of error it is insisted—*First*. That the evidence in the cause does not tend to support the verdict of the jury. We have carefully read the evidence, and we think it tends to support all the facts found by the jury. We cannot disturb the verdict on the weight of the evidence.

The appellee requested the court to require the jury to find

Objections to draft of special verdict. With such request, he submitted the draft of the special verdict returned by the jury, and which appears in the record, with the request that, if the jury approved the same, they should return it as their verdict. The appellant, at the proper time, objected to submitting this draft to the jury to be signed and returned by it, if adopted and approved, and stated its ground of objection to be that it did not cover all the material facts in issue to be proven in the cause, and especially that it was imperfect and defective, among other things, because it is a material fact in issue to find whether, during about two months before the plaintiff was injured, he did not daily, morning and evening, ride to and from his work, with the other laborers employed on said work, on the construction train of which Pool was engineer; and because it is a material fact in issue whether, during said time, while said plaintiff was so riding on said train, of which Pool was engineer, he, plaintiff, did not see and observe that the engineer started and stopped said train suddenly, and with big jerks, and without giving any signal of starting and stopping, and whether plaintiff had not seen men often thrown down by the violent starting of said train without signal, and whether said plaintiff did not know of said engineer's negligent habits. The court, over these objections, submitted said draft of special verdict to the jury, with instructions, if it approved the same, to fill the blank therein with the amount of damages assessed, and sign and return it as their verdict, to which the appellant excepted.

When the jury is instructed by the court to return a special verdict in a cause, we think either party, under the supervision of the court, has the right to submit to the jury a draft of a special verdict embracing the facts in the cause which he believes the evidence tends to prove. Should the plaintiff submit a draft omitting some fact material to his recovery, that is not a matter of which the defendant has a right to complain, as such omission inures to his benefit. If a draft presented should omit some fact which the opposite party thinks should be passed upon by the jury, he would doubtless have the right to submit a draft prepared by himself, embracing such additional fact; but the question could not be raised by objecting to the submission of a draft by his opponent containing matters proper to be submitted. *Louisville N. A. & C. R. Co. v. Hart*, 119 Ind. 273. In this case, however, it is to be observed that all the material facts embraced in the objection were in fact included in the draft of the special verdict submitted. The facts embraced in the objection, and not contained in draft of the special verdict,

were merely evidential facts, not proper to enter into a verdict. The court did not err in overruling this objection.

It is contended, *secondly*, that the court erred in refusing to give to the jury certain instructions asked by the appellant. The appellant tendered to the court at the proper time 20 instructions, all of which were refused. They are quite voluminous, covering many pages of legal cap, and no good purpose would be subserved by setting them out here. It is sufficient to say that perhaps many of them would have been proper and pertinent in a case where the jury was permitted to return a general verdict, but were wholly inapplicable in a case like this, where the jury was instructed to return a special verdict. The court gave to the jury all the instructions we think necessary to enable it to fully comprehend and pass upon the material facts in issue between the parties, and in our opinion there was no available error in refusing to give the instructions asked by the appellant. Louisville, N. A. & C. R. Co. v. Frawley, 110 Ind. 23, 28 Am. & Eng. R. Cas. 308.

Refusal of instructions.

The appellant moved the court to suppress questions 40 and 41, and the answers thereto, of the deposition of Andrew Shifkoski, taken on behalf of the appellee; but the court overruled the objection, and appellant excepted. The questions and answers to which objection was made were as follows: "Were you acquainted with Engineer Pool's general reputation all along the line of the Lake Shore and Michigan Southern Railway, prior to the time John Stupak was injured, as to carelessness as an engineer? *Answer.* Yes, sir. *Q.* Was it good or bad? *A.* Bad." This evidence we think was admissible, as it was one of the modes by which the appellee might prove notice or knowledge on the part of the appellant as to the negligent and careless habits of its engineer. If his reputation along the line of the appellant's road was notoriously bad, as being a careless or negligent employe, the jury was at liberty to infer from that fact that appellant through that means obtained notice of his carelessness.

Evidence—
Reputation of engineer.

The appellant took the deposition of one Joseph Kusch for the purpose of proving that appellee had notice of the careless and negligent habits of the engineer, Pool, prior to the time the appellee was injured. After proving by this witness that on one occasion he heard the appellee express the opinion that said engineer by his recklessness would kill all the men on the train, the appellee propounded to him this question: "Is that the only time you heard him say anything about it? *Answer.* I only once heard him. The other people

Evidence—
Plaintiff's
knowledge of
engineer's
carelessness.

talked with him." The court, on motion of the appellee, struck out from said answer the words, "The other people talked with him," and the appellant excepted. It is now claimed that this ruling of the court was error, for which the judgment should be reversed. We do not think the court erred in this ruling. There is nothing in the deposition from which the nature of the conversation with the other people can be ascertained. When they talked to the appellee, the subject of the conversation may have been entirely foreign to the matter under investigation in this case. If the appellant claimed that such talk related to the recklessness of the engineer in the management of his engine, it should have made that fact appear by proper questions propounded to its witness. In our opinion the court did not err in overruling the motion for a new trial.

This brings to us a consideration of the fifth and sixth assignments of error, and they may properly be considered together; for, if the verdict of the jury is sufficient to authorize a judgment for the appellee, the court did not err in overruling the motion of the appellant for judgment in its favor, nor did the court err in sustaining the motion of the appellee for judgment in his favor on said verdict. The jury expressly found that Walter Pool, the engineer, to whose carelessness the injury of the appellee is attributed, possessed sufficient skill to properly manage his engine. As to whether the verdict of the jury, therefore, authorizes a judgment in favor of the appellee, depends upon whether it is sufficiently shown that the appellant, after notice of his careless and reckless habits, negligently kept him in its employment. The averments of the complaint upon this subject are "that the defendant had in its service and employment, on the 13th day of August, 1883, and for four months prior thereto, as engineer of the locomotive engine used to propel said train of cars upon said work, as aforesaid, one Walter Pool, who was habitually careless and negligent in the discharge of his duties as such engineer in running and operating said engine, and hauling said train of flat cars, during all of said time, in this: that during said time said engineer habitually and generally ran and propelled said engine and train of flat cars at a high and unusual and dangerous rate of speed, and habitually and generally carelessly and negligently, started and stopped said engine and train of cars during said time with great and dangerous suddenness, and habitually and generally, during all of said time, carelessly and negligently stopped and started said train of flat cars, with great danger, without giving any signal or warning thereof whatever, and while laborers were engaged

Sufficiency of
special ver-
dict.

in unloading said train of flat cars, and was not possessed of sufficient skill to manage and operate said locomotive engine and train of flat cars in an ordinarily careful and prudent manner, of all which said defendant had due notice before said 13th day of August, as aforesaid, but carelessly and negligently retained said Pool in its service and employment as such engineer after such notice, and until the happening of the injuries hereinbefore mentioned." That portion of the verdict relating to the issue thus tendered is as follows: "That the defendant had sufficient and ample means of knowing the habits and conduct of said Pool, as such engineer, in the discharge of his duties, as aforesaid, before the 13th day of August, 1883, and we find that the defendant did have such knowledge before that date." As there is no allegation in the complaint that the appellant had been negligent in ascertaining the habits of Pool, or that it had failed to avail itself of the means at its command to ascertain such habits, so much of the verdict as finds that appellant had ample means of knowing such habits must be regarded as a finding outside of the issues, and must be disregarded by this court. *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186, 21 Am. & Eng. R. Cas. 478; *Conner v. Citizens' St. R. Co.*, 105 Ind. 62, 26 Am. & Eng. R. Cas. 210; *Buchanan v. Milligan*, 108 Ind. 433; *Western Union Tel. Co. v. Brown*, 108 Ind. 538, 14 Am. & Eng. Corp. Cas. 139.

It is to be observed that there is no express finding that the appellant negligently kept Pool in its service after notice of his negligent and careless habits. The court can add nothing to the special verdict by inference, but must deal with it as it is returned by the jury. *Buchanan v. Milligan*, *supra*; *Western Union Tel. Co. v. Brown*, *supra*. It is true the jury find that the appellant had notice of the negligent habits of Pool, the engineer, but we are not informed as to when such notice was received by the appellant. It may have been on the 12th day of August, after the close of business hours, the day before the injury to the appellee occurred. It may have been to some officer of the appellant who had no power to discharge Pool. When a master employs a competent and careful servant as in this case, he has the right to rely upon the presumption that he will continue careful and skillful, and, when notified that he has become careless, he is not ordinarily bound to discharge such servant without an investigation into such charge, unless such notice is accompanied by such evidence as leaves no reasonable doubt of the truth of such charge. A rule that would require the master to discharge a servant, careful and competent when employed,

without investigation, upon a charge of carelessness, would be a harsh one, and would often result in great injustice to employes. *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, 5 Am. & Eng. R. Cas. 554; *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1, 28 Am. & Eng. R. Cas. 323; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Moss v. Pacific R. Co.*, 49 Mo. 167; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *McDowell v. Chesapeake, O. & S. W. R. Co. (Ky.)*, 5 S. W. Rep. 413; *LaRose v. Logansport Nat. Bank*, 102 Ind. 332.

The material charge against the appellant, and without which the complaint would be bad, is that the appellant, with notice of the negligence and carelessness of Pool, the engineer, carelessly and negligently retained him in its service. The jury did not find this fact to exist, and we must therefore presume that it was not proven on the trial of the cause. In the absence of such a finding, the verdict does not authorize a judgment in favor of the appellee. It follows that the circuit court erred in sustaining the motion of the appellee for judgment in his favor on the special verdict of the jury. Judgment reversed, with instructions to the circuit court to overrule the motion of the appellee for judgment in his favor on the verdict, and to sustain the motion of the appellant for a *venire de novo*.

EAST LINE & RED RIVER R. Co.

v.

SCOTT.

(*Texas Supreme Court, November 12, 1889.*)

Master and Servant—Contract of Employment—Breach—Amendment of Petition.—Where the original petition alleged that the defendant agreed that when plaintiff should ask for and accept employment from it as a locomotive engineer, it would give him such employment "for whatever length of time plaintiff should desire to retain it," an amendment which charges "that defendant promised to give plaintiff employment on its road for the period and term of the natural life of plaintiff" sets up a new cause of action.

APPEAL from District Court, Marion County.

H. F. Prendergast for appellant.

H. McKay and *C. A. Culberson* for appellee.

HENRY, J.—Plaintiff was injured in a wreck on the de-

defendant's railroad. He instituted suit for damages in the district court. Afterwards that suit was compromised and dismissed, the defendant paying him a sum of money. On the 10th day of November, 1886, plaintiff filed his original petition in this suit, in which he alleged that by the terms of the compromise of the first suit, in addition to the money consideration paid to him, defendant agreed and promised that it would thereafter, when plaintiff should ask for and accept service and employment from it as a locomotive engineer on its road, give him such employment "for whatever length of time plaintiff should desire to retain it," at the reasonable and customary rate of pay for such employment. The original and amended petition charges that on the 1st day of July, 1886, plaintiff offered himself to defendant for said employment, but the company refused to employ him. Under this state of the pleadings there was a trial and judgment for plaintiff, which, on appeal by defendant to this court was reversed. 38 Am. & Eng. R. Cas. 16. In reversing the case, Chief Justice STAYTON says: "The evidence tends to show that the promise made on compromise was to give to appellee employment during his life, but it does not show that when appellee sought employment he proposed to render service for any named period, or so long as he might live and be able to perform the services contemplated. We must take the contract as alleged in the petition to be the contract on which appellee must recover, if at all; and, looking to that, there can be no doubt that whether appellee should serve appellant, and the term of such service depended upon his own will, it is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite or determinable by either party, that either may put an end to it at will, and so without cause."

In the district court, on the 7th day of January, 1889, plaintiff amended his petition as to the contract of employment so as to make it read, in that particular, "that defendant promised to give plaintiff employment on its road as a locomotive engineer for the period and term of the natural life of plaintiff;" in other respects, including the date of the breach of the contract, this amended petition contained substantially the same allegations that the original petition did. Among other issues, the defendant pleaded the statute of limitations of two years to the cause of action set up by the amended petition. The facts were proved to be as follows: (1) Plaintiff was injured in August, 1882, and filed a suit on May 22, 1884, which he compromised for \$4,500 in money, and an agreement to be employed as an engineer for

life, to begin as soon as he was able to go to work. (2) Plaintiff was unable to work until about July 1, 1886, at which time he applied for work, and was refused. (3) Plaintiff filed his original petition herein on November 10, 1886, which is copied into the statement of facts, and shows that the cause of action therein alleged was as we have stated above. (4) That the amended petition was filed on January 7, 1889. Defendant requested the court to charge that the amended petition set up a different cause of action, which was barred by the two-years statute of limitations. The refusal of the court to give this charge is assigned as error, and is the only question in the case.

We think the amended petition sets up an essentially different contract from the one alleged in the original petition.

Amendment sets out new cause of action.

The parties and the inducement or consideration are the same, but these do not, in either instance, constitute the whole of the undertaking. The contract alleged in the amended petition is substantially the one proved upon the trial of the original petition. If the contract, as now alleged, is substantially the same that it was then, the same objections might be urged to it now that were urged then. The difficulty on the former trial was of substance, and not of form. The amendment set up a new cause of action, and the proof, with nothing to the contrary, showed that the cause of action was barred when it was first pleaded. The court having committed error in refusing the charge requested, the judgment is reversed, and the cause is remanded.

HARRISON

v.

DETROIT, LANSING & NORTHERN R. CO.

(*Michigan Supreme Court, February 20, 1890.*)

Fellow Servants—Engineer and Fireman—Section-Hand.—Plaintiff, a section-hand, while engaged in loading telegraph poles on a flat-car, was injured by being thrown from the car through an engine backing against it for the purpose of moving the car. Plaintiff was working under the direction of the assistant roadmaster, but the engine while engaged in moving the car, was not under the roadmaster's control. Plaintiff's evidence tended to show that if the bell had been rung, he would have been warned of the approach of the engine and might have avoided injury. *Held*, that the defendant was entitled to an instruction that, if the accident was caused by the negligence of the engineer and fireman in failing to ring the

bell, the plaintiff was not entitled to recover, as they were his fellow-servants.

Master and Servant—Contributory Negligence—Remaining in Dangerous Position.—The evidence tended to show that plaintiff continued to work notwithstanding the approach of the engine, by the direction of the assistant roadmaster. The roadmaster testified that he had no knowledge of the approach of the engine. *Held*, that, if the plaintiff knew of the approach of the engine and failed to notify the roadmaster thereof, or to take steps to protect himself, notwithstanding the order of the roadmaster to continue the work, he was guilty of contributory negligence which precluded a recovery.

Fellow-Servants—Assistant Roadmaster and Section Hand—Vice-Principal.—An assistant roadmaster, who has charge of about 150 miles of railroad and has control of the section gangs thereon, employing and discharging the men, is not the fellow-servant of a section-hand engaged under his direction in loading telegraph poles upon a car for the purpose of being transported from one division of the road to another by direction of the general roadmaster, but is a vice-principal of the employer.

ERROR to Circuit Court, Kent County.

Action to recover damages for personal injuries. The defendant brings error to review a judgment for the plaintiff.

C. B. Lothrop and *Smith & Stevens* for appellant.

John A. Fairfield, (*Isaac M. Turner* and *Birney Hoyt*, of counsel), for appellee.

LONG, J.—This action is brought to recover for personal injuries sustained by the plaintiff through the claimed negligence of the servants of the defendant. On the trial the plaintiff had verdict and judgment for \$9,000.

The plaintiff had been in the employ of the defendant company for about eight years, though for some portion of that time he had been laid off, by direction of those in charge of the works of the company. During that time, his employment had been confined to the work as a section foreman and hand under a section boss. At the time of the injuries complained of, one George Light was the defendant's assistant roadmaster of the western division, having charge of its tracks from Stanton to Big Rapids, and from Howard City to Saginaw,—a line of about 150 miles of defendant's road; Mr. Doyle being the general roadmaster. On the morning of November 11, 1887, Light, having been ordered by Doyle, the general roadmaster, to go to Cedar Lake, east of Edmore, to move some telegraph poles, ordered two section foremen,—Cushton, to whose gang plaintiff belonged, and Horton,—to take their gangs there for that purpose. Light went with them from Edmore on a hand car, and assumed charge and direction of the work. The poles were partially loaded on a flat car standing on a side track, and in loading were piled much higher on the side of the

Facta.

car furthest from the pile of poles than on the other; the car being blocked up to prevent its tipping. A freight train came along on the main track from towards Edmore going eastward, when Light ordered the engine of this train to be detached for the purpose of moving the car upon which the poles were being placed to another part of the yard. The engine, on being detached, proceeded eastward beyond the switch; and, the switch being then turned, it was then backed in upon the switch towards the car upon which the plaintiff was at work,—plaintiff, with two other men, being on the east end of the car, with his back towards the approaching engine, and standing on the poles about five feet above the deck of the car. Plaintiff claims that the engine was then about 60 feet from him, when he desisted from his work, and turned his head around, looked towards the approaching engine, and said to Light, who plaintiff claims was standing near the main track, and about 10 feet east of the car on which plaintiff was at work: "George, this here car will about do. She is about level,"—and at the same time plaintiff grabbed hold of the poles to protect himself if the engine came back to the car, when Light replied: "Roll another pole over. What the hell are you looking at? You have lots of time. Roll them over! Roll them over!" While plaintiff and his witnesses place Light at this time some 8 or 10 feet east of the car, some other evidence puts him near the middle of it. When this order was given by Light, plaintiff resumed his work; and he testifies that he went to work because Light told him to; that Light was the boss of the gang that day. Plaintiff says that when he turned around to see, and saw the engine coming, he thought she was coming to make the switch to move the cars, and then he grabbed hold: but that when Light told him to go to work, he did the same as the rest, went to work to roll more poles over to level the car up, and did not think they were going to let the engine come back on the car until they got through. On being asked if he relied upon what Light said in that respect, he stated: "I had to do as he told me, or may be I would get the red ticket. I thought he would not let the engine come back while we were at work on it." While the plaintiff was so at work the engine was backed down against the car. Plaintiff was thrown off, and seriously, and, as it is claimed, permanently, injured, and in a condition which wholly prevents him from doing any kind of labor. It is claimed that Light took no steps to warn the plaintiff of the approach of the engine, or to prevent the engine from striking the car. Plaintiff also claims that the bell was not rung, and the jury so found; that he was listening for the bell, and, had he heard it, would have

taken it as a signal of danger, and protected himself. Mr. Light admits ordering the engineer to take the car upon which plaintiff and the others were at work, and move it to another part of the yard, but denies that he gave the plaintiff the order claimed; that he merely directed the men to level the poles on the car, but gave no other order until after the accident; that he stood with his back partly to the east, and at right angles to the east switch; that he saw the engine pass over the switch to the east and stop, and did not see it again until it struck the car. The defendant also contended that the bell was being rung while the engine was backing down.

At the close of the testimony, counsel for defendant requested the court to instruct the jury: "(1) If you find that the injury to the plaintiff was caused by the negligence of Mr. Light, the assistant roadmaster, the plaintiff cannot recover, for the reason that the two were fellow-servants, and the master is not liable for an injury to one caused by the negligence of another."

Instructions
requested by
defendant.

"(3) If you find that the plaintiff was ordered by Mr. Light to continue work while the engine was approaching the flat car upon which the plaintiff was at work, but at the same time the bell upon the engine was ringing and the engine was backing up, then the plaintiff was guilty of contributory negligence in failing to heed the warning of the bell; and your verdict must be for the defendant. (4) If you find that such order was given by Mr. Light, but that afterwards the bell upon the engine was rung as a warning of the approach of the engine to the flat car, then the plaintiff was guilty of contributory negligence, and cannot recover in this action. (5) If you find from the evidence that Mr. Light gave the order to the plaintiff to continue work, as the engine was backing up, but that the fact of its near approach was not known to Mr. Light when he gave the order, and was known to the plaintiff, then the plaintiff was guilty of contributory negligence in failing to notify Mr. Light of its approach, and to secure himself; and your verdict must be for the defendant. (6) If you find that Light gave the order as claimed by plaintiff, but at the time of giving it the danger from the engine was not imminent, then the giving of the order was not the proximate cause of the injury, but the proximate cause was his failure subsequently to warn the plaintiff; and for such neglect the defendant is not liable, and the plaintiff cannot recover. (7) If it was apparent to plaintiff, when he looked around to the engine, that the danger of the engine running into the flat car was then impending and imminent, then the plaintiff was guilty of negligence in obeying Light's order, and cannot recover. (8) The evidence shows that, if the bell

had been ringing as the engine backed down, the plaintiff would have been warned, and would not have been injured; and I charge you that the omission to ring the bell was the proximate cause of the injury, and the plaintiff cannot recover. (8) Under all the evidence in the case, the defendant is not liable for the injury to the plaintiff: and your verdict must be, no cause of action." The court refused to give these instructions, but instructed the jury that the negligence of Mr. Light would be the negligence of the company, and for which a recovery might be had.

Defendant's counsel submitted five special questions for a finding of the jury thereon as follows: "(1) If the bell had been rung as the engine backed down on the car, would such ringing have given warning to the plaintiff of the approach of the engine? (2) Was the bell upon the engine ringing when the engine was backing up on the side track to the car on which the plaintiff was at work? (3) Would the accident have happened if the bell on the engine had been ringing as the engine backed up against the flat car? (4) Was the accident caused by the failure of the plaintiff to heed the warning of the bell ringing? (5) At the time when the plaintiff turned and saw the engine coming and tried to make himself safe, as he testifies, was the danger imminent?" The court submitted the second, fourth, and fifth of these questions to the jury, and refused the others. To the second, the jury answered, "No;" to the fourth, they said it was disposed of by their answer to the second; and to the fifth, answered "No."

The principal questions argued here are grouped by counsel for defendant under the four following heads: "(1) If Light's negligence was the cause of the injury, was Light, in doing this work, the fellow-servant of plaintiff? (2) If he was not, then was his negligence the proximate cause of the accident? Or was such proximate cause the neglect of the engineer or fireman to ring the engine bell? (3) Whether appellant was entitled to have the two special questions one and three submitted. (4) Was the special verdict inconsistent with the general verdict?" No exceptions were taken to the admission or exclusion of evidence during the trial of the cause, and no complaint is made of the charge as given. The principal contention is that the plaintiff and Light were fellow-servants, and therefore the defendant company could not be held liable for the negligence of Light, even if, through his negligence, the plaintiff received his injuries.

It is too well settled in this state to need the citation of authorities that the master is not liable for injuries personally

Special Findings.

Questions involved.

suffered by his servant through the negligence of a fellow-servant, acting as such while engaged in the common employment, unless the master is chargeable with negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency. It is not contended in the present case that Mr. Light was incompetent for the position held by him as assistant roadmaster, but the claim of recovery is based upon the ground that he was not a fellow-servant of plaintiff. Neither is there any serious contention that the work being performed by the plaintiff was in itself dangerous. The rule, therefore, that the master is bound to provide a safe place in which to work, or suitable tools and materials to work with, has no application to this case. The fact that the plaintiff was ordered by Light to load the poles upon the car, and to go upon the car to level them, and his having done so in obedience to the order, was not putting him in a place of danger by the assistant roadmaster. The injuries which he received did not grow out of the work he was ordered to do, either from the work being dangerous in character, or the place in which he was working, dangerous. Neither was he injured by reason of any defect in machinery, tool, or other appliance he was called upon to use. There are many cases in this state holding that, when a superior servant orders one under him to perform work differing from that for which he is employed, the superior is guilty of an abuse of authority, and the master held liable. But in the present case the work being done was in the ordinary line of the duty of the section gang. Their ordinary duty is to keep the roadbed in repair but they are often called upon to load ties, poles, and other materials upon the flat cars, and to unload cars; and they must be held to assume the risk incident to such employment.

The injury resulted either from the negligence of Light in ordering the plaintiff to continue the work while the engine was backing down upon the car, and telling him there was plenty of time, thus throwing him off his guard, and leading him to believe that Light would take care that the engine did not strike the car, or it resulted from the negligence of the engineer or fireman in not ringing the bell, which, if it had been rung, might have given the plaintiff warning of the approach of the engine, so that he could have steadied himself as it struck the car, and thus saved himself from being thrown off, or it was the result of the plaintiff's own carelessness. If the injury grew out of the negligence of the engineer or fireman in not ringing the bell, if that was the immediate and proximate cause of the injury, the plaintiff would have no right of re-

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engineer and
fireman—Fel-
low-servants.

covery, as the law is well settled in this state that the engineer and fireman, under such circumstances, are the fellow-servants of the plaintiff. It therefore became a material fact in the case, for the determination of the jury, whether the failure of the engineer or fireman to ring the bell was the proximate cause of the injury; and the court was in error in not permitting the jury to pass upon the special questions 1 and 3 presented. The jury found that "the bell was not ringing when the engine was backing up on the side track to the car on which the plaintiff was at work." The plaintiff testified that, if he had heard the bell ringing, he would have looked around, and prepared himself for the shock. The answer to these special questions, "If the bell had been rung as the engine backed down on the car, would such ringing have given warning to the plaintiff of the approach of the engine? And would the accident have happened if the bell had been ringing as the engine backed against the flat car?"—might have shown that the jury found the injury was caused by the negligence of the engineer or fireman, and that the proximate cause of the injury was their negligence. Counsel for the plaintiff contend that these did not submit questions of fact, but possible contingencies, if certain facts which did not exist had existed, and were therefore not proper questions for submission to the jury. They were something beyond mere possibilities, under the testimony of the plaintiff himself. He was a railroad man,—had been engaged in that service for a series of years; and he knew, as he testifies, that the ringing of a bell on an engine is evidence that the engine is about to move or is moving; and even people who are not versed in the rules of railroad companies generally understand this fact. Therefore, according to this testimony, if the bell had been ringing he would have prepared himself for the shock; and the jury might have found, if the question had been submitted to them, that the accident would not have happened if the bell had been rung. This finding would, in effect, have been that the accident happened through the negligence of the engineer or fireman, and not through the fault of Light; for, even if Light gave the order to plaintiff to continue his work, and by such order indicated that the engine would be kept from backing down, yet, if plaintiff knew or believed, notwithstanding Light's assurances, that the engine was actually coming, and would strike the car, and place him in peril, very naturally he would have tried to save himself.

There is no evidence that Light had control of the engine, or that the engineer was not in full and complete charge of her. Evidently, the station agent, at the request of Light,

gave the order to the engineer to uncouple from his train, and have the flat car upon which the plaintiff was working moved forward to the other pile of poles. When the engine had backed down to the switch, the forward brakeman of the freight train opened the switch, and then ran back to the car to make the coupling, at the same time giving the engineer the signals to back down. This evidence shows that Light had nothing to do with making the coupling or giving the signals. While he stood near there, and, as plaintiff testifies, between the engine and flat car, near the track, there is no evidence in the case, that he had, or attempted to exercise, any control over the engineer in the manner of backing the engine down, or made any signals to stop or start. It was therefore an important element in the case, for the jury to determine under all the circumstances, and especially under the testimony of the plaintiff himself, whether the failure to ring the bell, if it was not rung, was the proximate cause of the injury; and the court should have submitted the special questions.

Control of engine.

The court was also in error in refusing to give the defendant's fifth and seventh requests to charge. If, as stated in the fifth request, Light did give the order to the plaintiff as he claims, but at that time Light did not know of the near approach of the engine, and the plaintiff did know of its approach, and failed to notify Light, or to save himself, he was guilty of contributory negligence. Plaintiff would have no right to claim that, though he saw the engine approaching, and knew that he would be put in peril when it backed against the car, yet he said nothing to Light, and made no effort to secure himself from the fall. If such facts existed the plaintiff must have apprehended a danger which was not apparent to Light. The evidence is somewhat conflicting as to whether the engine came to a stop after it approached or crossed over the switch, but Light testifies that he saw and heard nothing of its approach; that his back was turned partly towards the engine, and he was giving his attention to the men loading the poles. Plaintiff would have no right to recover damages for the negligence of Light, if he was aware of a danger which Light did not apprehend, and, being aware of it, did not seek to save himself from injury; and the fact that Light ordered him to go on with the work would not justify him to do so, in the face of danger which was apparent to him. This was covered by the seventh request, which should have been given.

Contributory negligence—Remaining in dangerous position.

The other requests, as framed and presented to the court, were properly refused. The first request to charge presents

the most important question in the case. It assumes that Light is a fellow-servant of the plaintiff, and therefore no recovery could be had, even if his negligence was the proximate cause of the injury. Under the circumstances of this case, was he a fellow-servant, or a representative of the defendant company, standing in the position of a superior servant or agent, for whose negligence defendant company is to be held liable? If Light, in this position as a superior servant, represented the defendant company, and the plaintiff, relying upon the statement of Light that he had lots of time, went to work again under the belief that Light would not let the engine back against the car until the poles had been leveled off, and Light knew that the engine was backing up, or was in a position where he would have known it if he had exercised ordinary care, and he gave the plaintiff no warning of its approach, and that plaintiff did not know of its approach, the negligence of Light in permitting the engine to back up, and failure to give such warning, would be the negligence of the defendant company, for which the plaintiff would be entitled to recover, if this, and not the engineer's or fireman's negligence in failing to ring the bell, was the proximate cause of the injury. Under such circumstances, the servant's dependent and inferior position is to be taken into consideration; and, if the peculiar risk commanded by the master is not obvious, the servant has the right to assume that he is not being put in peril, and is not bound to investigate into the risk before obeying his orders. He is not called upon to set up his own judgment against his superiors; and he may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own. And it is a general rule that if the master directs the servant to do some act which is even dangerous, but which could be made safe by special care upon the part of the master, the servant has the right to assume that such special care will be taken; and, failing to exercise such care, the master is held liable. The jury found that at the time when plaintiff turned and saw the engine coming, and tried to make himself safe, as he testifies, the danger was not imminent; and, from the issues submitted to them under the charge of the court, they also found that Light not only told the plaintiff there was lots of time, but that he negligently permitted the engine to be backed against the car. The management of the affairs of a railroad company is vested in its board of directors, and such powers as Doyle or Light possessed and exercised were such only as were delegated by the directors under the rules of the company. So far as the corporate directors are concerned, no question can be made that for all purposes they

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roadmaster.**

represent the corporation, and their acts as a board are the acts of the principal; but, in the management of the affairs, certain powers are and must be delegated to agents or servants who are clothed with certain discretionary powers. If the master places the entire charge of his business, or a distinct branch of it, wholly in the hands of an agent, exercising no discretion and no oversight, the neglect of the agent of the ordinary care in the exercise of the business of the master thus intrusted to him is a breach of duty for which the master is held liable.

Just what relation this superior servant bears to other servants it is often difficult to determine in a given case. The solution of the question must depend largely upon the power delegated to the superior servant, the exercise of such power, and his command and authority over those acting under him. The reciprocal rights and duties of such servants, and the liability of the master, are nowhere defined, except by adjudicated decisions of the courts; and in some of the states the duty and liability of the master is pushed much further than in others by these adjudications. In this state, in 1861, in the case of *Michigan Cent. R. Co. v. Leahey*,

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fellow-ser-
vants.

10 Mich. 199, the general doctrine was laid down that the master is not liable to a servant for the neglect of his fellow-servant in doing or omitting to do their portion of the common work. This rule has been followed and approved in numerous cases, which have been so often cited that a repetition is unnecessary. The rule grew out of the English doctrine laid down in *Priestly v. Fowler*, 3 Mees. & W. 1, in 1837, and which has since been adhered to in England. The Massachusetts court, in *Farwell v. Boston & W. R. Co.*, 4 Met. (Mass.), 49, (decided in 1842,) adopted the rule of the English courts. Other states followed this rule, until it has become the general doctrine in all the American states. The reason of this rule, as held by the Massachusetts courts in the early case above cited, is that, "where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer, for indemnity in case of loss by the negligence of each other. Regarding it in this light,

it is the ordinary case of one sustaining an injury, in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer."

The rule thus adopted did not, however, relieve the master from a duty and obligation to his servants, whether the master be a natural person or a corporation, to furnish safe machinery or other apparatus, and to observe all the care which the exigencies of the situation reasonably required, as well as to employ competent servants. It is the duty of the master, also, to make such regulations or provisions for the safety of employes as will afford them reasonable protection against the dangers incident to the performance of their respective duties. This duty extends to the selection of competent persons, to whom the master may delegate his authority, to take charge of and control the business in which the servants are employed. There is no diversity of opinion upon these propositions. The difficulties arise when courts are called upon to determine who are and who are not fellow-servants in given cases, and this difficulty is made apparent when we note the hundreds of cases which in the last few years have found their way to the courts of last resort in the different states of the Union. The courts are not in harmony upon this question.

In Massachusetts, it is said that this rule "is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman of higher grade or greater authority than the plaintiff." *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 2 Am. & Eng. R. Cas. 94, 7 Am. & Eng. Encyc. Law, 835. This rule is substantially followed in Maine, though it is said that an exception to the rule exists if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department of it; the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master. The rule is ably discussed by Chief Justice CHURCH in *Flike v. Boston & A. R. Co.*, 53 N. Y. 549, where he says: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and

Obligation of employer to furnish safe appliances.

Negligence of superior servants.

duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed." If an agent whose duty it is to employ servants or provide materials for the company acts negligently in that capacity, his fault is that of the company, because it occurred in the performance of the principal's duty, although only an agent himself. In *Malone v. Hathaway*, 64 N. Y. 5, Mr. Justice ALLEN makes the distinction between natural and artificial persons, and lays down the rule that it is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant, or where, as in the case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus placed in his stead. Under this rule, a foreman who had no delegation of power or control, but who was merely charged with special duties, was held to be a fellow-servant. 7 Am. & Eng. Encyc. Law, 834. Mr. Wharton, in his work on Negligence, (§ 229,) says this doctrine is in harmony with the American cases.

As before stated, it is difficult to lay down any general rule which shall determine all cases. In some of the states, it is undoubtedly true that the master is held to a much stricter accountability and responsibility for the acts and omissions of those who are classed by some of the other courts as fellow-servants; and the tendency of modern adjudications is more and more to relax the rule that those who are engaged in the same common enterprise or business are fellow-servants, especially if it can be pointed out that the one in fault occupies some higher grade or more power than the party injured. Especially is this the case where parties are servants of corporations. If parties are fellow-servants while engaged in the business of a natural person, the same rule and reasoning, under like circumstances, ought to place them in the same category while engaged in the business of a corporation; and if one is the agent or superior servant while engaged in the business of a corporation, and through whose negligent conduct another engaged in the same common enterprise is injured, and for whose injuries the corporation is held liable, then, under like circumstances, if it was the business of a natural person, the master should be so held. Some general rules may, however, be laid down, which in many instances may serve as a guide in the deter-

mination of the question. It is not to be determined solely from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes the duty upon the part of the master to perform, then the offending employe is not a fellow-servant, but a superior or agent, for whose acts the master is held liable.

Again, if the master has delegated to a servant or employe the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondet superior* applies. Whether or not the servant has power to employ and discharge other servants is also important in determining whether or not he is deemed to be a superior servant, for whose acts the master is held liable. *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83. When the offending servant, having general power and authority to employ and discharge servants, and having authority to direct and control the injured servant, orders him to do an act not within the scope of the injured servant's employment, whereby he is exposed to danger not contemplated in his contract of service, and he is injured in so doing; or where the master has charged a servant or employe with the sole duty of providing proper materials and appliances for carrying on the work in which he is personally engaged, and a servant is injured by his neglect so to do, the master is held liable to the injured servant while acting under the orders of the superior servant. *Gilmore v. Northern Pac. R. Co.*, 18 Fed. Rep. 866, 15 Am. & Eng. R. Cas. 304. These rules are in line with the remarks of Mr. Justice COOLEY in *Quincy Min. Co. v. Kitts*, 42 Mich. 39, though the learned justice, in finally deciding the case, held that Wagner did not stand, in respect to the company, in such position. It was, however, remarked by him that, when a servant demands from his master compensation for an injury received in his service, it is necessary that he trace some distinct fault to the master himself. The mere fact of such injury is no evidence of such fault; neither is the mere fact that it resulted from the carelessness of some other person in the same employment. The servant assumes all the usual risks of his employment, and among these is the risk that fellow-servants will sometimes be careless, and that injuries will result. All that can be required of the master in that regard is that his servants shall be prudently chosen,

Vice-principals.

and that they shall not be retained in his service after unfitness or negligence shall be discovered, and has been communicated to him. This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and, if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of his business. If there is negligence in this, the master is responsible for it, whether the supervision be by the master in person, or by some manager, superintendent, or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority. In support of this doctrine the following cases are cited: *Albro v. Agawam Can. Co.*, 6 Cush. (Mass.), 75; *McAndrews v. Burns*, 39 N. J. L. 117; *Malone v. Hathaway*, 64 N. Y. 9; *Hard v. Vermont & C. R. Co.*, 32 Vt. 473.

In *Ryan v. Bagaley*, 50 Mich. 179, it appeared that the defendant resided at Pittsburg, and was proprietor of the Palmer Iron Mines. Decedent, while working as a laborer in the mine, was killed. The defense was that the casualty was owing to the negligence of Whitesides, who was a fellow-servant. It appeared that Kirkpatrick was the agent of defendant first in station. He knew nothing of the business, and appointed Whitesides as mining captain, and with whom the defendant, on his visits to the mine, consulted. Upon the question whether Whitesides was the fellow-servant of the deceased, the circuit judge charged the jury: "Now, what was the position of Captain Whitesides? He was a mining captain. I think it appears from the testimony that he had the entire charge and control of the underground work, and all the work generally of the mine, and that he employed and discharged men. Now, I charge you that Captain Whitesides, if he had this power delegated to him—to manage and control the mine—negligence on his part, would be the negligence of the owners or managers of the mine." This court, in considering that part of the charge, says: "Under this charge, and in view of all the facts, it was settled by the jury that Whitesides' position and power were as indicated by the judge. We are consequently to consider that he was intrusted with the management of the mine, without direction or interference. He was not, in any true sense, a mere foreman or department leader or sub-chief, in a given sphere of

the mining operations. His agency covered the entire mine, and his capacity and discretion dominated. The defendant and the agent, Kirkpatrick, equally regarded him, and looked to him, as the one person to contrive and execute; and they were guided by his intelligence, not he by theirs. In respect to legal accountability, his negligence was the negligence of the defendant. The case is within the principle stated and recognized in *Quincy Min. Co. v. Kitts*, 42 Mich. 34.

Many cases have been presented to this court involving the questions as to who were and who were not fellow-ser-

**Roadmaster
and section-
hand not fel-
low-servants.**

vants, but in no instance has the question been presented under circumstances exactly like the present case; so that we must determine it upon its own peculiar facts, being guided by the rules here laid down. Applying, therefore, the foregoing rules, so far as the same can be made applicable to this case, is Light to be treated as a superior servant, for whose negligence, if any is shown, the defendant company can be held liable? He had general charge of the entire length of about 150 miles of defendant's road, and had under his control all the section gangs along that line; and there is nothing in the record showing that Doyle, the general roadmaster, in any way interfered with him in the manner in which the work of that division was being conducted. He in fact controlled that entire division absolutely, so far as employing and discharging the men was concerned. The order came from Doyle to remove these poles, because they were to be taken to another division or branch of the same road. Doyle was not present at the time of the injury, and the fair inference is that whatever power Doyle would have had, if present, Light had like power, and represented the defendant company as fully as Doyle would have done. He did no manual labor himself, but had the full oversight, care, and management of it. It is apparent that the business of the railroad could not be carried forward without this division of labor and responsibility. It was necessary that these heads of departments and divisions should be made, and power delegated to each head. Under such circumstances, and well-settled rules of law, it must be held that Light represented the company: and for his negligence, while in the line of the duties so assigned and delegated to him, the company must be held responsible. It is evident that the plaintiff and the other section hands there looked upon Light as the responsible head, from whom they received their orders, and whom they were bound to obey, or else they would receive their "red tickets," or discharges from their employment. Any other rule than this would enable the master to escape all liability, by parceling out his work to

different heads of departments or divisions, and retiring from any management or control of it; and the more he abandoned it to others—the more he neglected it—the less would he be liable. When the master appoints a middleman with such powers as were delegated to Light in this case, or where the business is of such a nature that it is necessarily committed to agents, with full power to employ and discharge those acting under them, and has full and absolute control of the work, the principal is liable. The master is in a position to select such middlemen and agents with care, and in regard to their fitness for the place, and is responsible for their negligence. *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Malone v. Hathaway*, 64 N. Y. 9. For the errors pointed out, the judgment below must be set aside, with costs, and a new trial granted. The other justices concurred.

Injuries to Employe—Failure to Extricate Oneself from Dangerous Position.—The failure of a railroad employe to extricate himself from a perilous situation brought about by the negligence of a co-employe, when he could do so by the use of ordinary care, will bar his right to recover. *Parker v. Georgia Pac. R. Co.*, Ga. Sup. Ct., Oct. 28, 1889.

Same—Assuming Dangerous Position—Injuries Caused by Recklessness of Another.—The fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or recklessly injuring him. An act may be legally willful without a direct intent. It may be so willful if reckless. *Shumacher v. St. Louis & S. F. R. Co.*, 39 Fed. Rep. 174.

Same—Unnecessarily Going into Dangerous Place.—A workman who was one of the gang of men engaged in removing stone from the side of a railroad, was told to go upon a car near which a large stone was hanging suspended by a chain. He knew that the men using the chain considered it to be unsafe, but he went under the same and the stone fell upon and injured him. It was not necessary for him to go under it to reach the car. *Held*, that he was guilty of contributory negligence, and could not recover. *Kinney v. Corbin*, Pa. Sup. Ct., Feb. 17, 1890.

Negligence of Fellow-Servant—Loading Rails upon Flat Car.—Plaintiff was in the employ of the defendant as a laborer or construction hand under a construction boss or foreman. The foreman had authority to direct the plaintiff, and also, in his discretion, to discharge him or any other servant working under his direction and control. Plaintiff, with other section-men, went upon defendant's construction train which was under the control and direction of the foreman, to a place between two stations on its railroad. They were there commanded by the foreman to load upon a flat-car about 40 steel rails which were lying near the track. The plaintiff and the other employes proceeded to load the rails, the foreman directing the loading of the car. Each rail was from 24 to 29 feet long, and weighed from 400 to 600 pounds. To lift one of them, the labors of about 10 men were required. In loading the rails, the men were required to act in concert,—to lay hold of and lift the rail and walk with it to the flat-car, and there halt, dress, and, at the word of command given by the foreman, lift the rail and cast it with one motion upon the flat-car. By reason of the length and great weight of the rails, it was necessary that concert of action should be exercised and that some person should give the word of command in each of the several stages of progress in loading them, and particularly at the point when the rail was to be thrown upon the car.

The nearest siding or switch was two miles distant. When all but three or four rails were loaded upon the flat-car, the regular freight train of the defendant appeared rapidly approaching. The foreman thereupon with violent oaths and imprecations urged plaintiff and the other men to make haste and complete the loading of the rails, so that he might move the construction train to the side track and out of the way of the freight train. By reason of the great haste so caused and the confusion resulting therefrom, plaintiff, who had been before and then was working and lifting at the end of the rail seized by the gang to which he belonged, was crowded off from that rail. The foreman thereupon commanded plaintiff with oaths and violent language to lay hold of the other rail, and not to stand idle. Plaintiff in obedience thereto, seized upon the rail being lifted by the other gang and lifted to the flat-car. While plaintiff and the other men so holding the rail were waiting the word of command to lift it, the foreman with further oaths, imprecations, etc., ordered the party to get the rail on any way they could, not giving to them any word of command. Thereupon the party, hurried and agitated by the foreman's conduct, lifted it without concert, some at one moment and some at another, and threw the rail at one end with force and at the other end with less force, so that it fell back upon plaintiff and injured him. *Held*, that plaintiff's injury was not caused by any negligence on the part of the foreman, but that the accident was caused by his own negligence, or that of his fellow-servants, and he could not recover. *Coyne v. Union Pac. R. Co.*, U. S. Sup. Ct., March 3, 1890.

ADAMS *et al.*

v.

IRON CLIFFS CO.

(*Michigan Supreme Court, December 28, 1889.*)

Negligently Causing Death—Presumption in Absence of Eye-Witnesses.—In an action for damages for negligently causing death, while the plaintiff must show that his intestate was without fault, yet where there was no eye-witness of the accident the presumption, in the absence of any evidence to the contrary, obtains that the deceased exercised due care and caution in attempting to cross a railroad track, and such presumption is sufficient to permit the plaintiff to recover upon showing negligence in the defendant.

Same—Contributory Negligence—Province of Jury.—A highway crossing was obstructed by standing cars. Along the side of the track was a bank of snow about two feet high, and between this bank of snow and the cars there was not room enough for a man to walk. There was evidence tending to show that deceased finding the crossing obstructed, had undertaken to go around the car, probably supporting himself by placing his hands upon the side of the car while he walked on the bank of snow alongside, and that the sudden starting of the cars had thrown him down and under the wheels. *Held*, that the question whether it was contributory negligence on his part to walk along the said cars upon the bank or ridge of snow for the purpose of crossing the track, was for the jury.

Same—Crossing—Dedication of Road.—There was testimony that a road had existed for over twenty years, and that there was no other means of

communication between two villages. The mail between the two places had been carried over the road for fourteen years. When the defendant, an iron company, constructed its furnaces and laid down a railroad track, it made a crossing, not in the immediate line of the road, but in the neighborhood. It was shown that it was customary in the neighborhood for the public to use private roads of mining locations without asking the consent of the owners. It was not shown that the public authorities had ever done work upon the road within the limits of the defendant's premises, but the testimony showed that work had been done up to the line of defendant's premises. When defendant laid down the railroad track, it made a substantial crossing for the road, planking it between the rails. *Held*, that the evidence was sufficient to require the submission to the jury of the question whether the defendants had dedicated the road to the public, and whether it had become a public road by user.

Same—License to Use Crossing—Duty of Defendant.—*Held*, also, that in any event, as long as the defendant permitted the public to use the crossing without any dissent, it was estopped from denying that as far as such crossing was concerned, it bore the same relation and duty to travelers as if it were in fact a public highway, and it was bound to use due care and diligence in running its trains over the crossing to prevent injury to passengers lawfully on the road.

Master and Servant—When Relation Exists—Employee Leaving Premises.—The superintendent of an iron furnace who has started to leave the premises upon private business of his own as he was in the habit of doing daily, whose duties are multifarious, and who may be called upon at any time while upon the premises to render services to his employer, does not cease to occupy the relation of a servant until he has actually left the premises.

Fellow-Servants—Founder and Engineer of Train Used on Premises.—A founder employed to superintend the furnace of an iron company and having charge of the inside work of the furnace is, although he has nothing to do with the other departments, the fellow-servant of the engineer of a train engaged in hauling ore and coal for use in the furnace.

Master and Servant—Assumption of Risk—Superintendent of Furnace.—The superintendent of a furnace assumes the risk of injury at a highway crossing within the premises through the operation of cars upon a railroad in connection with the business.

ERROR to Circuit Court, Marquette County.

Action to recover damages for negligently killing plaintiff's intestate. The jury, by direction of the court, returned a verdict for the defendant, and judgment was entered thereon. The plaintiffs appealed.

Hayden & Young for appellants.

W. P. Healy, (*Arch. B. Eldredge*, of counsel,) for appellee.

MORSE, J.—This action is brought for the death of James A. Root, on March 8, 1886, by the alleged negligence of defendant. The court directed a verdict for the defendant upon several grounds: *First*. The declaration alleged that the accident occurred on a public highway, and that the deceased was therefore entitled to all the rights and privileges of a traveler on a public highway. The court found that there was no testimony tending to show that the road in question was

Instruction to
return ver-
dict for de-
fendant.

a public highway of sufficient force to be submitted to the jury, and held that this was the private road of the defendant, and that the public had acquired no rights in it by user or otherwise. *Second.* The court found that the plaintiff's intestate must have been guilty of contributory negligence. *Third.* That none of the allegations in the declaration of plaintiffs as to defendant's negligence had any foundation in fact, except the averment that the engineer was negligent in starting his train without warning, and that as to this negligence of the engineer, such engineer was a fellow-servant of the deceased, and there being nothing in the case to show that defendant did not use due diligence in the employment of competent men, and no evidence that the engineer or brakeman was not competent, the plaintiffs could not recover for any negligence on the part of said engineer.

In order to fully understand the bearing and correctness of these rulings it will be necessary to state some of the surroundings and circumstances of the accident or killing of Mr. Root, as shown upon the trial by the plaintiffs. The defendant corporation owns and operates a blast furnace at Negaunee, on the line of the Chicago & Northwestern Railway. This furnace manufactures charcoal and pig-iron. This requires room for cord-wood, charcoal, flax, and iron ore, as well as a yard in which to store the pig-iron. The furnace consists of two stacks, and a tract of land called the "furnace bank" is occupied in carrying on the business. This location is unfenced. From the main line of the Northwestern Railway, there ran up to the furnace, at quite a steep grade, two parallel tracks, and these two tracks connected with other tracks that ran directly into the furnace. These tracks were built by the defendant, but belonged to the railroad company, and were used by both the defendant and said company as occasion required, but principally by the defendant. Across these two parallel tracks, called "furnace tracks," there ran three different roads or wagon tracks, all of which connected with a single road or highway leading from the city of Negaunee to Palmer, a village built up in consequence of the Palmer mine and other mines near it. The lower road across the furnace track, and the one nearest the Northwestern Railway, was the road principally used in going from Negaunee to Palmer, or "Cascade," as that village was sometimes called, and was known as the "Cascade Road," and was the road used as a mail route between the two places. Upon the morning of the day of Mr. Root's death, and about 10 o'clock defendant's engineer, John Beck, with one brakeman, John Wannamaki, had started from the furnace bank with an engine, backing

from five to seven empty box-cars slowly down the grade towards the main line of the Northwestern Railway. As these cars reached the crossing, the brakeman, who was on top of them, saw some cars loaded with pig-iron, which were standing on the other furnace track, get away from the control of the persons in charge of them, and start down the grade. He immediately set two brakes on what he called the front car, the one furthest from the engine, of his train, and ran down to help stop the cars on the other track. The cars on the first track were stopped over the crossing nearest the railway, and called by the plaintiffs the "Cascade Road." He testifies that half of the forward car was over the crossing. The next crossing was also blocked by cars, but the upper crossing was open. This was seldom used, however. The testimony is not very definite as to how long these cars remained upon the crossing, the time being somewhere between 5 and 15 minutes. It is not shown how Mr. Root got under the cars, as no one was present when it happened. The last seen of him was a few minutes before, when he was going along the lower road or highway towards the city of Negaunee. When the brakeman stopped his cars, and before going to the help of the others, he ran back, and told Beck, the engineer, to stop there until he got back. He then ran down to the runaway cars. He jumped on top of them, and set the brakes and stopped them. After they were stopped, he started to go back to his own cars. He did not signal the engineer to start. While going back he heard a yell, and saw the section-boss, Calloghan, running towards the brakeman's cars, which were moving down the grade. There was no bell on the engine of this train, but it was provided with a whistle, which plaintiffs claim was not blown before the starting. Mr. Root was found caught by his right hip under the brake beams of the rear wheels of the foremost car as they were backing. He was lying on his back, with his face turned upward, and his head and body were outside of the track. He was dragged in this way down the track, until his body struck the guard-rail of the frog. The train was then stopped, and Mr. Root taken out. He died almost instantly after being released. How deceased was caught, and when, cannot be definitely ascertained, as when first seen the cars were moving, with his body caught and held under the cars, as above stated. There were some blood spots on the snow alongside the rail, beginning at a place a dozen feet or so from the traveled part of the road, over the crossing; and the marks of his body dragging from this point were seen down to the frog, about 300 feet from the crossing. Along the south side of this furnace track, and on

the side where Mr. Root evidently attempted to cross, was a bank of snow about two feet high, and between this bank of snow and the cars there was not room enough for a man to walk. It was the theory of the plaintiffs upon the trial that Root, seeing the train remain so long, had undertaken to go around the car, probably supporting himself by placing his hands upon the side of the car while he walked on the bank of snow alongside, and the sudden starting of the cars had thrown him down and under the wheels.

The court charged the jury as follows: "Now, what evidence have you as to the manner of killing? We find the cars

Charge of
court.

across the crossing. We find Mr. Root either under the rear car wheels of the first or the second car. The height of the cars above the track was somewhere from two to two and a half feet. The track was of the usual width, we assume—in the neighborhood of four or five feet wide. The deceased would have to go some way down the track in order to get across. Now it is clear that there are three ways in which the deceased might have got under those cars. He might have attempted to have gone under there, under the assumption that the cars would stand there until he had time; he might have undertaken to have gone around, and the cars started, and he was thrown down and thrown under; or he might have reached the end of the car, and been knocked down and run over when he reached the end. In either case, gentlemen, what was his duty? The plaintiffs claim that they would go to you, as I understand it, upon the theory that the deceased had gone around the car. Assume that to be the case, then you have heard the testimony in regard to the speed with which this train went down. I take it that in that case,—that train and engine attached standing upon the track,—it is notice to every one that that train may start at any time. It is in law, in my judgment, clearly contributory negligence for persons to go along by the side of that car, where, if it moves, they are in danger of being thrown under, or to go around the end of the car, and be so near that when the train started, as it did here, they may be knocked down and caught under the cars. I take it gentlemen, it is the law, a man may not go so near a train of cars as that, going around, under circumstances of this case, and still have a jury say that they will infer that he was in the exercise of due care and caution. It seems to me clear that it cannot be the law. If he attempted to get underneath the cars, and go across, then that was clearly contributory negligence. So I must charge you, gentlemen, that the plaintiffs in this case have failed to show you evidence from which you would have the right to infer

that the deceased was in the exercise of proper care and caution."

It would not do to leave juries to guess; there must be evidence from which they may find the substantial facts to entitle a party to recover. This brings up squarely the question of contributory negligence in a case where there is no eye-witness of the accident. In such a case, while the rule is not relaxed that the plaintiff must show that his intestate was without fault, yet the presumption in the absence of any evidence to the contrary, obtains that the deceased used ordinary care and caution in attempting the crossing, and such presumption is sufficient under the rule to permit the plaintiff to recover upon showing negligence in the defendant. *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 274; *Mynning v. Detroit, L. & N. R. Co.*, 59 Mich. 257, 23 Am. & Eng. R. Cas. 317; 64 Mich. 102, 28 Am. & Eng. R. Cas. 665, and 67 Mich. 680; *Kwiatkowski v. Grand Trunk R. Co.*, 70 Mich. 549; *Chicago, R. I. & P. R. Co. v. Clark*, 108 Ill. 113, 15 Am. & Eng. R. Cas. 261; *Teipel v. Hilsendegen*, 44 Mich. 462. The court was of the opinion that the deceased might or must have been caught in one of three ways, and that it would not do for the jury to guess as to the facts of the case. But one of these three ways by which the plaintiff's intestate might have got under the cars, to-wit, undertaking to go around the cars by walking on this bank of snow, and slipping therefrom under the cars, was, in the theory of the plaintiffs, the manner in which he did slip or fall under them, and the plaintiffs had the right, under the testimony, to go to the jury upon this theory, provided such an attempt to go around the cars was not contributory negligence on the part of the deceased. If there was, under the facts shown, a chance for different conclusions to be drawn by ordinarily candid and intelligent men, it was a question to be determined by the jury and not by the court. *Alexander v. Big Rapids*, 70 Mich. 224; *Crosby v. Detroit, G. H. & M. R. Co.*, 58 Mich. 463, 23 Am. & Eng. R. Cas. 191; *Teipel v. Hilsendegen*, 44 Mich. 462; *Luke v. Wheat Min. Co.*, 39 N. W. Rep. 11-13. And it seems plain from the testimony of plaintiffs' witnesses, which alone must be relied upon for the solution of this question, as the whole case was taken from the jury, that this was the way the accident happened. The deceased could not have been at the end of the car, and there knocked down and run over, as it was clear from all the testimony that no wheel had passed over him, as he was found caught under the brake-beams of one of the rear wheels. Nor is it at all probable that he was attempting to crawl under the cars. The position in which he was found would in-

Presumption
in absence of
eye-witness.

dicare to most minds that he had slipped and fell upon his back under the cars, and got caught in that position, and in the position in which he was first discovered, and remained until he was pulled out. Was it contributory negligence in the deceased, attempting to walk along the side of the cars upon the ridge or bank of snow? I think the question was one eminently proper to be submitted to a jury, and one which a court has no right to decide.

It appears from the testimony that Mr. Root was a man between the age of 59 and 60 years, and well acquainted with the location and its surroundings, and with the business of the defendant, and its method of conducting such business. He was founder in the blast furnace, and a skilled man in the business. He knew that the train of cars before him was managed by a brakeman and engineer, without the aid of any other persons. The cars were on a steep down grade, upon which they would not ordinarily, and could not with safety, be backed downward without the presence and work of the brakeman. Mr. Root had started to go down town with the evident intention of attending to some private business of his own. When last seen by Fuller there were at that time no cars upon this crossing of the main road, leading to the city of Negaunee. It is quite probable that Root saw these cars stopped upon the track before he reached it, and the brakeman leave them to go after the runaway cars. If such was the case, was it negligence for Root, as a prudent man, to undertake to walk around them, a distance of about a half a car or more, upon this snow-bank? Would an ordinarily prudent man have done so? I have my own opinion, which it is not necessary here to express, but I am satisfied from what has already transpired in the case that ordinarily intelligent, careful, unbiased men might differ in their answers to this question, and therefore it should have been submitted to the jury. It is claimed that between 200 and 300 feet away there was a clear crossing which Root should have taken, but the query again arises, what would an ordinarily prudent man have done under the circumstances, knowing that the cars were set with brakes and stopped, and the brakeman gone to look after the other cars—would he have tried to go a few feet around the cars, or would he have gone 200 or more feet out of his way and back again to find a clear crossing? This was for a jury to determine. Unless the mere act of walking upon this snow-bank was negligence, because he was liable to slip thereon, if not careful, I do not think it could be considered negligence in Root's attempting to pass around the car that blocked the crossing. If there

Contributory
negligence of
deceased—
Province of
Jury.

had been no snow-bank there, but level ground, no one would claim that the attempt to walk around the car was in itself negligence; and whether or not the walking on top of this bank of snow was negligence was, under the testimony of the condition of such snow-bank, a question for the jury. It cannot be considered that he was bound to know, as claimed by defendant's counsel, that this train, without any brakeman upon it, and without any warning, was liable to move at any moment. How often in cities, where a number of tracks cross the street, do men and women pass around the end of stationary trains, when perhaps if they should happen to trip, and fall across the track, and the train start suddenly, without previous warning, they might be caught under it. In such a case, if the railroad employees were negligent, would it be said, as a matter of law, that the contributory negligence of the person injured must preclude recovery? I think not, and that the facts and circumstances would properly be submitted to a jury for them to determine whether or not there was negligence in such an attempted crossing.

The next subject of inquiry is the negligence of the defendant, and in this connection it will be proper to notice the testimony on the part of the plaintiffs as to this road, the crossing of which was blocked by this car. The circuit judge was satisfied that there was no evidence to go to the jury to show it to be any other than a private road of defendant's upon which it owed no duty to the public or to travelers. The declaration of plaintiffs avers it to be a "public traveled highway;" that Root was lawfully traveling upon such highway, and attempted, as he had a right to do, to cross the furnace track at the highway crossing; "that while he was so attempting to pass along said highway, across said track at said crossing, without fault on his part, said cars and locomotive, without ringing of a bell or any other warning from said locomotive whatever, and in the absence therefrom of brakemen, and while apparently abandoned, and without any warning from any brakeman thereon, and in the absence of any flagman or watchman at said crossing, as aforesaid, and without any warning of any kind whatever to plaintiff's intestate, suddenly started with said cars backwards across said crossing, the engine being at the rear of the train as it moved, and thereupon, by means of the neglect and misconduct of the defendant, as aforesaid, and without his fault, said James A. Root was thrown down and under said cars, run over, and pushed and dragged along, under said moving cars, a long distance, to wit, ten rods, and thereby so badly injured that he died within, to wit, two hours thereafter." There was testimony on behalf of plaintiff

Dedication of
highway.

iffs that this road had existed since 1863; that there is no other means of going, and no other roads, between Palmer and Negaunee. A creek called "Partridge Creek" is the south boundary line of the defendant's property. The highway crosses a bridge over this creek, which bridge was repaired at different times by the city of Negaunee. The village of Palmer in 1886 had 800 inhabitants. The mail between the two places has been carried over this road since 1872. The road did not run exactly where it does now, across the defendant's premises, until 1881. In that year these furnace tracks were laid down, and the company made two crossings—the one where Root was killed, and one above. Since that time the travel has gone over the road where the accident took place, except in cases of heavy loads, when they use the next crossing above. One witness, Mr. Kirkpatrick, testified that there was another little narrow road running from Negaunee to Palmer, but it was a roundabout way, and used only for women to drive to the city who were in fear of the locomotive scaring horses on the road across the furnace premises. It was shown by this witness, on cross-examination by Mr. Healey, of counsel for defendant, that it was customary in the Upper Peninsula for the public to use the private roads of mining locations without asking the consent of the owners. It was not shown that the public authorities of Negaunee had ever done any work upon this road within the limits of defendant's location, but testimony was offered and introduced tending to show work upon the road by the city authorities up to the line of such location, but this was afterwards excluded by the court. I think it was competent to show that this road across the company's premises was a connecting link between a public road from Palmer to Negaunee, and that the testimony offered was proper for that purpose. No road was ever legally laid out between Palmer and Negaunee, but the plaintiffs claimed it was a road by user. This road was used by the public before these furnace tracks were constructed, and when they were laid down the defendant made a substantial crossing for this road, planking it between the rails of its track. The furnace bank was there in 1863, when this road was first used from Palmer to Negaunee, and such road passed over defendant's premises until 1881. When these tracks were laid in that year, the defendant, for its own convenience, in making the crossing changed the line of the road somewhat, but this does not change the situation.

There was competent testimony offered to show that the public had accepted the dedication of this highway by working upon it between Palmer and Negaunee up to the line of

defendant's property on each side, and had repaired and maintained a bridge, half of which stood on defendant's premises. There is no doubt but it was a public road by user of more than 20 years, except upon the defendant's premises, and that the road upon its own property was used for the same length of time as a connecting link between the two ends of this road by its full consent. It was not necessary that it should be laid out, or attempted to be laid out, by the highway authorities. It could become a public highway by user alone. *Bumpus v. Miller*, 4 Mich. 159; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 209; *Baker v. Johnston*, 21 Mich. 319; *Wicks v. Ross*, 37 Mich. 464; *Peninsular Iron & L. Co. v. Crystal Falls*, 60 Mich. 523; *Kruger v. Le Blanc*, 70 Mich. 76. This was a county road, and as such could be accepted by the public by user alone. It was not necessary to show that there had been a formal acceptance by the highway authorities. Public user alone, when sufficiently general and long continued, will constitute an acceptance. See *Detroit v. Detroit & M. R. Co.*, 23 Mich. 209; citing *Green v. Canaan*, 29 Conn. 157; see, also, *Baker v. Johnston*, 21 Mich., at p. 344, per CAMPBELL, C. J.

Under the circumstances as shown by the plaintiffs, they were entitled to go to the jury on the proposition that the defendant, by keeping up this connecting link, and permitting it to be used generally by the public for a period of over 20 years, had thereby dedicated its use as such a link to the public; and also, that at any event, as long as it permitted the public to use this crossing without any dissent, the defendant was estopped from denying that, as far as such crossing was concerned, it bore the same relation and duty to travelers upon it as if it were in fact a public highway, and was bound to use due care and diligence in running its trains over this crossing to prevent injury to passengers lawfully on this road. *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615.

License to
public to use
crossing.

It is not a sound proposition, either in morals or the law, that the defendant, permitting the public to use a road across its premises for so many years, planking the crossings of its furnace tracks for the accommodation of such public use, and allowing such road to be connected at one end by a bridge, partly upon its property, with the public highway leading to Palmer, and at the other end with the public road to Negau-nee, forming, by so doing, with these connections, the only road for public travel between these two places, can yet be authorized to treat every one, except its own employes, as trespassers while using this crossing. But this is the logical

outcome of the claim made by defendant's counsel in this case ; and such counsel contend that if, at the moment Root was injured, he was not in the employ of the defendant, he was nothing more or less than a trespasser.

If the view that I have taken of this crossing be correct, then the engineer was negligent if he started the cars without any warning. This engineer, who was sworn for

**Negligence of
engineer in
starting with-
out signal.**

the defendant, testified that the brakeman signaled him to back the cars, which the brakeman denies. He also testifies that he blew the whistle three times before he started to back down. The testimony of the plaintiffs tended to show that no whistle was blown. Whether it was blown or not was a question for the jury. The circuit judge ruled that the engineer was a fellow-servant of the deceased. If so, then the direction of the verdict in favor of the defendant was right.

It is claimed by plaintiffs' counsel that Mr. Root was not in the employ of the company at the time he was injured.

**When rela-
tion of master
and servant
ceased.**

Conceding that the deceased had started to go down town to attend to some private business of his own, which he was in the habit of doing every day, or nearly every day, still, when this accident occurred, he must be considered to have been in the employ of the defendant. There was no stated time in which he was authorized by his employment to leave the service of the defendant and go down town, and attend to his own business. It would appear that his duties at the furnace were not so exacting but that he could go about his private business at times without detriment to the defendant, and there is no doubt but he was permitted to do so. But his employment by the defendant was such that he was not authorized to subordinate its business to his own, and at any time during working hours when he was on defendant's premises his duty was to look after and perform his duties there. His duties were multifarious, and if, at any time, after he had started to go down town and while on defendant's premises, any need of his services had arisen, it would have been his duty, under his employment, to have at once stopped and given such service. He was not permitted at any time to say in his own mind : " I will now leave the employment of the company at once, and go about my own business," regardless of what might occur on the premises before he left them requiring his care and attention under his employment. He was not out of the employment of the defendant until he was off its premises. *Broderick v. Detroit, U. R. S. & D. Co.*, 56 Mich. 261, 268. While he was at the furnace location he had the care and management of a portion of defendant's

property, which would call for his attention and oversight. See, also, *Ewald v. Chicago & N. W. R. Co.*, 70 Wis. 420, 33 Am. & Eng. R. Cas. 326. If this accident had occurred after Root's day's work was ended, the authorities cited by plaintiff's counsel would apply; but they do not touch the case at bar. See *Baird v. Pettit*, 70 Pa. St. 477, 483, and TAYLOR, J., (dissenting opinion), *Ewald v. Chicago & N. W. R. Co.*, 70 Wis. 420, 33 Am. & Eng. R. Cas. 326, and cases there cited.

The only remaining question is, did the circuit judge err in holding, as a matter of law, that Root was a fellow-servant of the engineer? The business of the engineer, by his own testimony, was to move the cars on the furnace track as desired in the business. "Ques-

Who are fellow-servants?

tion. Who gave you orders? Who was in control of you? *Answer.* When I first took the position, sometimes Mr. Corbett and sometimes Mr. Root. If the master mechanic had anything to do,—wanted a car shoved, or machinery,—he would come and tell me what to do. After I got into the way of the business, I knew what to do, without there was any extra work to do. If there was anything extra to do, who wanted it done would come and ask me to do it." That Mr. Thompson was the master mechanic, and he was foreman generally over the machinery. Alexander Maitland was the general manager of the whole business. He testified on behalf of the defendant that Root, as founder, had charge of the furnace. "Every man around working the furnace was subject to Root's orders. He had the right to order the master mechanic, from the fact that if the machinery was out of order, or any pipes broken, he had the right to authorize that man to repair those, or he couldn't run his furnace. He had the right to go to the blacksmith shop, and tell him to make what was necessary for him for the proper use of the furnace. He had the right to go to the carpenter, and do the same thing. He had the right to go to Mr. Corbett, who had charge of all the laborers, and tell him to do whatever was required to be done for the successful running of the furnace. In fact, as founder, he ought to have those rights, or he couldn't get along. I couldn't be there to direct, and someone must have authority around the furnace, and the founder is supposed to be the man that knows all about the operations,—what is wanted to be done to run the furnace, and to be successful. To curtail his authority would be to hamper him, and make the plant unprofitable. In regard to carrying out pig-iron, and where it should be piled, and who was to pile it, that was decidedly his business, because he was responsible for the proper grading of the iron, and proper piling of it; and I have always, in any matters regarding

piling the iron, I always consulted and talked with Mr. Root about it. He didn't take direct charge of the handling of the locomotive, from the fact that it was not necessary at all times, unless he desired a change. These departments might be organized for the purpose of lightening his labors to a certain extent. He would not have to look after them actively all the time. He had the right to tell the engineer where to place his cars, and tell him to bring in what he wanted." Mr. Corbett, a witness for defendant, testified that he controlled the men working outside of the furnace. He was bank boss. Thompson, the master mechanic, kept the engineer's time. The men that Corbett controlled loaded pig-iron, unloaded ore and stock charcoal in the shed. He directed the movement of cars at times. On the part of the plaintiffs, Mr. West testified that he worked as assistant under Root for four years, and one year running an engine; that Root's duties as founder were the charge and control of the inside work of the furnace. He had nothing to do with the outside work, such as moving cars or engines about the furnace. "It was outside of his business. If he wanted anything done,—anything of that kind,—he went to the man who had charge of the outside work, the bankman, Mr. Corbett. Witness thinks the engineer was under control of the master mechanic. Root had no control or direction, or right to direct the engineer or brakemen, in the discharge of their duties. Beyond the discharge of his particular duties, he came into no particular contact with these outside men." Root had 16 men under him, that he hired himself, and outside of them he could not order any one to do anything. When he wanted anything, coal, ore, or work done, he could request it, and that was all. Under plaintiff's testimony, Root had a separate department, the inside work of the furnace, and had nothing to do with the other departments, except he acted through the general management or the foreman or boss of such departments. He had no control beyond his own work, though all were engaged in the same common object, to-wit, the manufacture of pig-iron. If this makes him a fellow-servant of the engineer, then the court below was correct in its ruling. By an equal division of this court in *Sell v. Charles Rietz Bros. Lumber Co.*, 70 Mich. 479, it was held that the plaintiff who worked in the saw mill of the company was a fellow-servant of the men in charge of the warehouse kept for the storage of salt. It appeared in that case that the saw mill and salt block were run in conjunction, but the business of one was really separate and distinct from the other. For that reason the court divided. Here it was all one business, but divided into different departments.

The general doctrine as to fellow-servants is laid down in the text books as follows: "All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments, are fellow-servants." 2 Thomp. Neg. 1026; Cooley, Torts, 544, note; Wood, Mast. & Serv. § 433; Mechem, Ag. § 668. Nor does it make any difference that the servant guilty of the negligence is a servant of superior authority, unless such superior servant arises to the grade of the *alter ego* of the principal. There are certain duties, however, which belong to the master, which cannot be delegated to an agent or servant so as to relieve himself of responsibility; among other things, the duty of selecting competent servants, the providing of suitable machinery and appliances, and a safe place to work. The duty of providing a safe and efficient method of moving trains upon these furnace crossings would come under this head. The engine was not provided with a bell, but there was a whistle, which, if used, would be sufficient warning of its approach. The negligence, if any, consisted in the obstructing of the crossing, and the sudden starting of the cars without blowing the whistle. This was the negligence of the engineer, who was a servant of defendant, against whom no charge of incompetency is made. I am satisfied that the circuit judge, in his ruling that the engineer was a fellow-servant of Root, followed the settled law of this state. Peterson v. Chicago & N. W. R. Co., 67 Mich. 102, 109, 31 Am. & Eng. R. Cas. 292; Michigan Cent. R. Co. v. Dolan, 32 Mich. 510; Smith v. Potter, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; Michigan Cent. R. Co. v. Austin, 40 Mich. 247; Quincy Min. Co. v. Kitts, 42 Mich. 34; Greenwald v. Marquette, H. & O. R. Co., 49 Mich. 197, 8 Am. & Eng. R. Cas. 133; Gardiner v. Michigan Cent. R. Co., 58 Mich. 584, 24 Am. & Eng. R. Cas. 435; Davis v. Detroit & M. R. Co., 20 Mich. 105.

It is suggested as an independent proposition that the risk of injury at this crossing from the management of this train of cars was not one assumed by the deceased in his employment; that there was nothing in the nature of his employment to subject him to such a risk. This suggestion is not tenable. These cars were running hourly and daily in the business of defendant. Without such running from the main railway line to the furnace Mr. Root could not have operated the furnace over which he had control. He not only relied upon these cars, but called upon them to furnish coal, etc., for the uses of the furnace. He knew that they must pass over this crossing every few min-

Risks of employment.

utes, and he also knew that he must use the crossing more or less in his employment. He therefore assumed the risk that these cars might be handled negligently by his fellow-servants, the persons employed in running and managing them. The judgment must therefore be affirmed, with costs.

SHERWOOD, C. J., and LONG, J., concur.

CAMPBELL, J.—I concur in the result, on the ground that there was no liability in the company on any ground that I can conceive.

CHAMPLIN, J., did not sit.

Injuries to Employee—Sufficiency of Evidence in absence of Testimony of Eye-Witnesses.—The evidence showed that plaintiff, a brakeman, was properly on the top of a car. In order to couple another car which was defective, the draw-bars and bumpers having been broken from it, to the train, he was obliged to descend with his back to the defective car. The accident occurred when he was so descending, or just as he reached the ground. *Held*, that in the absence of any other evidence, the jury were authorized to find that he exercised due care. *Guthrie v. Maine Cent. R. Co.*, 81 Me. 572.

Same—Coupling Car with Defective Bumpers.—The plaintiff in an action for personal injuries was a brakeman in defendant's employ. He was ordered to couple a car from the end of which the draw-bar and bumpers had been broken, to a moving train. Before he executed the order the accident occurred, and he became unconscious. There was no direct evidence as to how plaintiff was injured. He testified that he had done something towards making the coupling and there was medical evidence as to the nature of the injury. There was no evidence to show that the injury was due to any other cause than the defective car. *Held*, that the question whether the injury was due to that cause or not was for the jury. *Guthrie v. Maine Cent. R. Co.*, 81 Me. 572.

Same—Bridge-Watchman—Sufficiency of Evidence.—The plaintiff in an action for personal injuries was watchman upon a railroad bridge. He was injured by a passing train, and the only theory upon which a verdict in his favor could be sustained, was that he was caught on the trestle. This theory was only supported by the testimony of three witnesses who visited the scene of the accident 8 or 10 hours after it happened, and who testified that a spot of blood was found at the foot of the east abutment, from 30 to 50 feet in a direct line from the top of the trestle. The injuries sustained by plaintiff rendered him unconscious for several weeks, and when he regained consciousness he had no recollection of the details of the accident. There was testimony on the part of the engineer and two passengers that plaintiff was struck at the end of the bridge, probably while sitting close to the track. He did not receive any wounds, except one on his head, which could have been made by the locomotive bumpers. *Held*, that a verdict in his favor must be set aside. *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95.

Contributory Negligence—Province of Jury.—To refer to the jury the question of the plaintiff's duty under certain circumstances detailed in the evidence is only to refer to them the question of his diligence or negligence, and is not error. *Parker v. Georgia Pac. R. Co.*, Ga. Sup. Ct., Oct. 28, 1889.

Same—Switchman on Top of Load of Lumber.—Plaintiff was employed as a switchman. On the occasion of the accident, he was standing on the last car on the top of lumber with which it was loaded, and was at his

proper position. After moving some distance, the train suddenly slackened speed without any signal being given and without warning, and plaintiff, being unprepared for the jerk, was thrown 7 or 8 feet to the ground upon the track in front of the car. There was no means by which he could hold on to the lumber, and his duty required him to stand up. While on the car his back was to the engine, and he was looking in the direction the train was moving. It was the engineer's duty not to stop unless the plaintiff gave him the signal, but the yard master ordered him to stop the train. *Held*, that the question whether plaintiff stationed himself too far forward in taking his position upon the car loaded with lumber, was properly submitted to the jury. *Central R. & B. Co. v. Dickson*, Ga. Sup. Ct., April 8, 1889.

Same—Coupling Cars—Instructions—Expression of Opinion on Facts.—

The court, in an action for damages for personal injuries sustained by plaintiff while coupling cars, charged the jury that "if you believe from the evidence that the plaintiff was directed by the yard conductor to go in and make a coupling, and that he signaled the engineer to stop, that the engineer stopped, and that the plaintiff in the exercise of ordinary care and diligence on his part to avoid the injury, was proceeding to shift a coupling pin from a lower to a higher bumper in order to make a coupling, and that the engineer without any notice to him negligently came back, and that plaintiff's hand was caught and injured," the plaintiff would be entitled to recover. *Held*, that the instruction left the question of contributory negligence to the jury, and was merely a statement of the law applicable to the case upon certain facts, if such facts were found by the jury, and was not open to the objection that it was an expression of opinion as to the facts. *Central R. Co. v. Neighbors*, Ga. Sup. Ct., Oct. 9, 1889.

Contributory Negligence—Gross Recklessness of Conductor of Gravel Train.—If a conductor in charge of a gravel train was aware of the peril of a party who was in a position of danger, or might by the exercise of ordinary care have discovered it in time to have avoided the injury to the party plaintiff, and it appears that he permitted the danger to be created; that he thereafter, and up to the time of the collision, failed to use the means within his power with a proper degree of care consistent with the safety of those on board the train to avoid the infliction of such injury to them as would spring as a probable, reasonable, and natural consequence from the act—a state of case would be created which would indicate such a degree of indifference to the rights of others as to warrant the characterization of such conduct as recklessness of such a character as to leave no place for the doctrine of contributory negligence in the case. *Schumacher v. St. Louis & S. F. R. Co.*, 39 Fed. Rep. 174.

Same—Brakeman—Forgetfulness of Defect.—Plaintiff was a brakeman on a train of freight cars. The rear car of the train was the caboose; the third car from the caboose was an ordinary "house car;" the fourth one was laden with lumber. The car upon which plaintiff was required to take position while the train was in motion, was about the eighth or tenth from the caboose. Some time before the accident, plaintiff while passing over the house car discovered that it had one step off the end nearest the engine, and immediately called the attention of the conductor to the fact. The conductor promised to drop the car at a certain coal yard or junction, if upon looking at his manifests he found that it did not contain perishable freight. When the train stopped at a station some miles before reaching the coal yard or junction, the plaintiff went to the caboose to eat his breakfast and warm himself. While he was there, the train moved on. It was snowing, freezing and sleeting at the time. Plaintiff immediately started for his post. Upon reaching the front end of the house car, he attempted to let himself down from it in order to reach the next car ahead.

of him which was the lumber car, and pass over the ladder to one on which he usually stood while the train was in motion. At the moment he let himself down from the house car, he forgot that one of its steps was missing, and before realizing the danger of his position and not being able to help himself back to the car, he fell below upon the railroad track and was run over. *Held*, that the question whether plaintiff was guilty of contributory negligence should have been submitted to the jury, and that a direction by the court to return a verdict for the defendant was erroneous. *Kane v. Northern Cent. R. Co.*, 128 U. S. 91.

HARLAN, J., who delivered the opinion of the court, said:—"We are of opinion that the question of contributory negligence should have been submitted to the jury. It cannot be said that the plaintiff was guilty of contributory negligence in staying upon the train, in the capacity of brakeman, after observing that a step was missing from one of the cars over which he might pass while discharging his duties. An employe upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily. Besides, the danger arising from the defective car was not so imminent as to subject him to the charge of recklessness in remaining at his post under the conductor's assurance that the car should be removed from the train when it reached the coal yard or junction, if, upon examining his manifests, he found that it did not contain perishable freight. *Hough v. Texas & P. R. Co.*, 100 U. S. 224; *District of Columbia v. McElligott*, 117 U. S. 621, 631. But it is said that the efficient, proximate cause of the injury to the plaintiff was his use of the defective appliances at the end of the car from which he fell, when he knew, and, at the moment of letting himself down from that car, should not have forgotten, as he said he did, that one of its steps was missing. It is undoubtedly the law that an employe is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger. *Hough v. Texas & P. R. Co.*; *District of Columbia v. McElligott and Goodlet v. Louisville & N. R. Co.* above cited; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 24 Am. & Eng. R. Cas. 407. But in determining whether an employe has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion. In the case before us, the jury may, not unreasonably, have inferred from the evidence, that while the plaintiff was passing along the tops of the cars, for the purpose of reaching his post, he was so blinded or confused by the darkness, snow, and rain, or so affected by the severe cold, that he failed to observe, in time to protect himself, that the car from which he attempted to let himself down was the identical one which, during the previous part of the night, he had discovered to be without its full complement of steps. While a proper regard for his own personal safety, and his duty to his employer, required that he should bear in mind, while passing over the cars to his station, that one of them was defective in its appointments, it was also his duty to reach his post at the earliest practical moment, for not only might the safety of the moving train have depended upon the brakemen being at their posts, but the engineer was entitled to know, as the train moved off, by signals from the brakeman, if necessary, that none of the cars constituting the train had become detached. If it be suggested that the plaintiff ought not to have left his post and gone to the caboose when the train stopped

at Coldfelters, the answer, furnished by the proof, is, that he was justified in so doing, by usage and by the extraordinary severity of the weather. And if his going back from the caboose was characterized by such haste as interfered with a critical examination of the cars as he passed over them, that may, in some measure at least, have been due to the fact that the first notice he had of the necessity of immediately returning to his post, was that the train was moving off."

UNION PACIFIC R. CO.

v.

BILLETER.

(*Nebraska Supreme Court, January 7, 1890.*)

Fellow-Servants—Engine—Employee of Independent Contractor.—Plaintiff in error was engaged in operating a railroad in this state, and, for the purpose of securing the removal of his coal from the coal pocket into the tender, gave an independent contract to one H. to place the coal in the proper pocket prepared by plaintiff in error, and from which to load the tenders of the locomotives by which the line was operated. H. hired his own assistants, paying them out of his own means. They were employed and discharged by him alone, and alone they looked to him for their compensation. Defendant in error was employed by him to assist in this work, his duty being to notify the engineers as to the proper position in which their engines should be placed for receiving the coal, and to place the coal in the tender; but in which the engineer rendered no assistance. It was the duty of the engineer to place the engine in its proper place, leaving it stationary until the coal was loaded; but in the discharge of which he received no assistance from defendant in error. It was *held* that the engineer and defendant in error were not fellow-servants, under the rule exempting the railroad company from damages resulting from the negligent act of fellow-servants.

Contributory Negligence—Evidence.—The evidence was examined, and it was *held* that the finding of the trial jury that defendant in error was not guilty of contributory negligence, and that the engineer of plaintiff in error was guilty of negligence, was sustained.

ERROR from District Court, Dodge County.

J. W. Thurston, W. R. Kelly, and J. A. Shropshire for plaintiff in error.

E. F. Gray for defendant in error.

REESE, C. J.—This action was instituted in the district court of Dodge county, and was for damages resulting from personal injuries received by defendant in error while loading coal into the tender of one of defendant's engines from a chute or pocket at Valley station, on the line of defendant's railroad. In addition to the usual averments of the corporate capacity of plaintiff in error, it was

Complaint.

alleged in the petition that plaintiff in error maintained an apparatus for receiving coal, and loading the same into the tenders of the locomotives, called a pocket and apron, said pocket being constructed and used to receive coal, and said apron being constructed so as to carry the coal from the pocket to the tender of defendant's engine; the pocket and apron being so constructed as to allow the apron to be let down and suspended over the tender, and by which act the door of the pocket became automatically unloosed, and the coal was allowed to run from the pocket to the tender of the engine. "That, at and before the committing of the wrongs and injuries hereinafter mentioned, one Thomas Hunter, by virtue of an independent contract with said defendant, had the management and control of said apparatus, and of the receiving of coal into said pocket, and loading same into said tender, by the use of said apron; and by the terms of said contract he was paid for the management, receiving, and loading aforesaid, by the quantity of coal so handled by him in and with said apparatus, and was subject to no control of said defendant therein; and that, in order to perform said contract, he necessarily employed, controlled, and paid men to do and assist in doing the work in the performance of said contract on his part. That, at and before the commission of the wrongs and injuries hereinafter mentioned, the said plaintiff was in the employ of said Hunter, independent contractor as aforesaid, and by the duties of his employment was required to operate said apparatus, and load said tender with coal from said pocket, using said apron therefor. That on the 22d day of April, 1888, the said plaintiff, in the employment aforesaid, while operating said apparatus and loading coal therewith, in the said defendant's tender of its locomotive then attached to a freight train, and stopped at said apparatus on the said railroad for that purpose, having discharged a tender load of coal into said tender by said apparatus, he necessarily, without any negligence, wrong, default, or want of ordinary care on his part, stepped upon said tender at the front end thereof, to remove from said apron coal remaining thereon, preparatory to swinging said apron into position, and out of the way of passing trains, so that said train could move on its way, when, as said plaintiff was so upon said tender in the act of removing said coal from the said apron, without any negligence, wrong, default, or want of ordinary care on his part, the said defendant, by its engineer of said locomotive and train, negligently, wrongfully, and without reasonable and ordinary care, suddenly, and without ringing the bell, sounding the whistle, or other notice or warning, started the said locomotive backward, and thereby caught said plaintiff's left leg be-

tween the top of the cab of the said locomotive and the said apron, and thereby crushed, broke, and injured plaintiff's left leg," etc. Plaintiff in error files its answer, by which it admitted its corporate capacity; the operation of the railway as alleged in the petition; the construction and operation of the apparatus for receiving coal, and loading the same into its locomotive. That the handling of said coal at Valley station was let by contract to Thomas Hunter, who employed defendant in error, and that defendant in error was not in the employ of plaintiff in error at the time of the accident. Contributory negligence on the part of defendant in error was affirmatively alleged, and negligence on the part of plaintiff in error was denied, as well as the fact of a permanent injury having been suffered by defendant in error. The reply was a general denial of the affirmative allegations contained in the answer. A jury trial was had, which resulted in a verdict and judgment in favor of defendant in error. The cause was brought to this court by plaintiff in error for review, by proceedings in error.

The evidence submitted to the trial jury on the question of the employment of defendant in error was substantially all to the effect that he was employed by Hunter alone, who was an independent contractor, under plaintiff in error; that there was no privity of contract between plaintiff in error and defendant in error, his wages being paid by Hunter, and by whom alone he was employed, and liable to be discharged, and to whom alone he was responsible for the manner in which he performed the labor assigned to him.

Plaintiff in error requested the court to give to the jury instruction No. 1, which was as follows: "The jury are instructed, as a matter of law, that, where a servant is injured in the course of his employment by the negligence of a fellow-servant, the master is not liable to the injured party; and it is not necessary, in order to come within the rule respecting fellow-servants, that the injured party and the one causing the injury should be in the service of the same employer or master, but they may be, as is shown in this case, servants of different masters; and if they are engaged in the same common business, for a common purpose, or for either of the masters, they may be fellow-servants, and hence within the rule. It is conclusively shown by the testimony that, at the time of the injury, the plaintiff and the engineer were engaged in a business for a common purpose; that is, for the benefit of defendant here in the prosecution of its business. That, while it was the duty of the engineer to move, place, and operate his engine, it was also the duty of the plaintiff to direct the engineer how and

Instructions
requested by
defendant.

when to place his engine, that is, it required the co-operation of both in order to coal the engine properly. It was necessary for them to work to a common purpose, and to a common end, in order to transact the business in which they were engaged. This being so, they were, in contemplation of law, fellow-servants, and as such each was bound to exercise a due regard for the safety of the other, and neither employer would be liable for the injury of one servant caused by the negligence of the other. The plaintiff claims that his injuries resulted solely through the negligence of the engineer, in permitting the engine to back up as described by the testimony. If you should so find, then your verdict must be for the defendant, for the reason above stated." This instruction the court refused to give, and to which plaintiff in error excepted.

The evidence shows that, in the proper discharge of his duties, defendant in error notified the engineer of plaintiff in error which of the pockets containing the coal was the one from which the coal should be removed into the tender. That the engineer stopped the train at about the proper place, and, after it became stationary, defendant in error proceeded to withdraw the coal from the pocket into the tender, by the use of the apron above referred to. That while he was doing the work in hand the engineer proceeded to oil his engine, and after the coal had been run from the pocket to the tender, and while defendant in error was removing from the apron, and from the pocket, some pieces of coal which had lodged, and which it became necessary to remove in order to replace the apron so that the engine could be removed and other trains could pass, the engineer reversed the steam by throwing back the reverse lever, in order that he might oil certain portions of the engine, and that by reason of the reverse lever being thrown back, the engine, without warning or signal of any kind, ran back, catching plaintiff's limb between the apron and the cab of the engine, by which the injury was received. It was the duty of the engineer to place his engine in a proper position, and allow it to remain stationary until the coal was placed in the tender, the apron thrown back, and word given to him by the usual and customary signal, without causing the engine to remove from its place. As we have said, it was the duty of defendant in error to notify the engineer as to the place where the engine could be stationed for receiving the coal; that he could then place the coal in the tender without any assistance from the engineer; and when his duties were performed, to notify the engineer of the fact, that he might move on,—the engineer being in the employ of plaintiff in error, defendant in error being in the employ of the contractor, Hunter. It is insisted

that, under these facts, the instruction should have been given. We think not.

There was no evidence anywhere tending to show that the engineer and defendant in error were in any sense fellow-servants within the legal rule. Without citing any of the many authorities presented by counsel upon either side, we think it is sufficient here to quote a clear statement of this rule in 1 Shear. & R. Neg. § 225, which is as follows: "Mere co-operation or community of labor and ultimate purpose is not enough to make men fellow-servants. They are not fellow-servants unless they are all under the control and direction of a common master. Therefore, where a servant works side by side with one employed by his master as an independent contractor, or with a servant of such contractor, or the servant of a contractor works with the servants of a subcontractor, they are not fellow-servants, even though they help to do the same work, for the benefit of the same ultimate employer; and the master of the former servant is therefore responsible for an injury caused by the servant's negligence in such work, either to the contractor or to the contractor's servant." See, also, *Young v. New York Cent. R. Co.*, 30 Barb. (N. Y.), 229; *Gerlach v. Edelmeyer*, 47 N. Y. Super. Ct. 292. There was no error, therefore, in the refusal to give the instruction asked. There is no criticism upon the instructions given by the court to the jury, and they need not be here noticed.

Engineer and
plaintiff not
fellow-ser-
vants.

It is contended that defendant in error was guilty of contributory negligence in stepping from the top of the cab onto the tool-box which is placed upon the front end of the tender, for the purpose of removing coal from the apron and pocket which had not become entirely disengaged from them prior to the elevation of the apron. It was sought upon the trial to show that the instruction of Mr. Hunter, the contractor, had been to those engaged in that work to refrain from stepping upon the tool-box referred to. There was no proof that any instructions of the kind had been conveyed to defendant in error; but, upon the contrary, it was shown that this was the usual and customary habit adopted for the purpose designated. Plaintiff in error then called witnesses for the purpose of establishing the fact that general instructions of the kind referred to had been issued by Hunter, without reference to their having been brought to plaintiff's knowledge. This we infer from the questions propounded to the witnesses. Objection was made upon the ground of the immateriality of the evidence which was sustained, and to which plaintiff in error excepted, but made no offer of the proof of any fact which it proposed

Evidence of
contributory
negligence.

to submit to the consideration of the court and jury. This was necessary, in order to a consideration by this court of the question presented.

It is next contended that the verdict is not sustained by sufficient evidence, and that defendant in error was guilty of contributory negligence at the time when he received the injury of which complaint is made. The evidence submitted to the jury was in some sense contradictory, yet we think it sufficiently appears that the universal custom was to allow the engine to remain stationary during the time that defendant in error was filling the tender with coal, that there was no reason for him to expect that the engine would be removed, and it is clearly shown that the engineer did not contemplate a removal of the engine; that it was not only the custom of defendant in error, but of other persons engaged in that employment, to step from the top of the cab onto the tool-box, for the purpose of removing the coal which might accumulate either at the mouth of the pocket or upon the apron, in order that the apron might be thrown back to its proper place; that the accident was caused solely by the act of the engineer in reversing the lever, the movement of the engine being owing to the fact that there was steam in the steam-chest at the time the lever was reversed. While it is quite probable that the engineer was not aware of the presence of the steam in the chest, it is doubtless true that he was aware of the fact that, if the steam was present at the time he reversed the lever, the necessary result would be a removal of the engine. Whether any effort on his part was made to ascertain as to whether the steam was in the chest or not does not appear, or, at any rate, he did not satisfy himself that it was not there. The lever was reversed without the knowledge of defendant in error, and without his attention being called in any way to the fact, or that there was danger of the engine being moved backward by the action of the engineer. So far as we are able to see, he was not in any degree guilty of contributory negligence, but the action of the engineer, without giving warning to others, was competent for the jury to consider for the purpose of ascertaining whether or not the accident was caused by his want of due and proper care. The judgment of the district court is affirmed. The other judges concur.

Express Messenger and Employee of Railroad Company as Fellow-Servants.

—An express messenger in the employ of an express company, who is carried on the train of a railroad company without a ticket or payment of fare, but under a contract between the railroad company and the express company, is not in any sense engaged in any common employment with the servants of the railroad company. *Jennings v. Grand Trunk R. Co.* 15 Ont. App. Rep. 477.

TAYLOR

v.

EVANSVILLE & TERRE HAUTE R. CO.

(Indiana Supreme Court, November 21, 1889.)

Fellow-Servants—Master Mechanic and Machinist.—A master mechanic who is invested with full authority over those employed in a shop under his control, is not fellow-servant of a machinist who is engaged under his direction in disconnecting the equalizer of a locomotive, and who is injured in consequence of the equalizer being negligently pulled out of its place by the master mechanic.

APPEAL from Superior Court, Vanderburgh County.

Action to recover damages for personal injuries. The plaintiff appeals from a judgment sustaining a demurrer to the complaint.

Brownlee & Gudgel for appellant.

John E. Iglehart and *Edwin Taylor* for appellee.

ELLIOTT, C. J.—The appellant was a machinist in the service of the appellee, engaged in work in its shops in the city of Evansville, under the control of its master mechanic, John Torrence. The master mechanic had the entire control of the shop, of all the employes therein, and of all work. He had full authority to employ and discharge the machinists and workmen, and he had authority to select and to change machinery. On the 21st day of April, 1884, the appellee desired to inspect the head of the equalizer on one of its locomotives for the purpose of ascertaining whether the key could be changed, and its master mechanic ordered the appellant to disconnect the equalizer, and remove it from its place, in order to enable the master mechanic to examine it. While the appellant was engaged in the work of removing the key of the equalizer, under the master mechanic's direction, the equalizer was negligently pulled out of its place by the master mechanic, and it fell upon the appellant, and very severely injured him. The equalizer was a piece of iron weighing 200 pounds, and it was caused to fall upon the appellant by the negligence of the master mechanic, and without any fault on the appellant's part.

It is established law in this jurisdiction that the common master is not responsible to an employe for an injury caused by the negligence of a co-employe. From this rule, so long set-

tled, we cannot depart. *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75; *Capper v. Louisville, E. & St. L. R. Co.*, 103 Ind. 305, 21 Am. & Eng. R. Cas. 525; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Bogard v. Louisville, E. & St. L. R. Co.*, *Id.* 491; *Atlas Engine Works v. Randall*, *Id.* 293. It is also settled that the fact that the one employe is the superior of the other makes no difference, for the question is not one of rank. The question is, were they fellow-servants? If they were, there can be no recovery against the master for injuries caused by the negligence of the co-employe. *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Brazil & C. Coal Co. v. Cain*, 98 Ind. 282; *Indiana Car Co. v. Parker*, *supra*; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 23 Am. & Eng. R. Cas. 408; *McCosker v. Long Island R. Co.*, 84 N. Y. 77, 5 Am. & Eng. Corp. Cas. 564; *Crispin v. Babbitt*, 81 N. Y. 516; *Moore v. Wabash, St. L. & P. R. Co.* (Mo.), 21 Am. & Eng. R. Cas. 509.

If Torrence was acting in the capacity of a co-employe at the time his negligence caused the appellant's injury, this action cannot be maintained, although he was the appellant's superior, and had the right to retain or discharge him. An agent of high rank may be, at the time an act is done, the fellow-servant of another employe, occupying a subordinate position. *Hussey v. Cogger*, 112 N. Y. 614. If, for instance, the general superintendent should take hold of one end of an iron rail to assist an employe of the company in loading it on the car, he would be, as to that single act, a fellow-employe, although as to other acts he might be the representative of the master. Where, however, the agent whose negligence caused the injury is at the time in the master's place, then he is not a co-employe, but a representative of the employer. His breach of duty is then the employer's wrong, for in such cases the act of the representative is the act of the principal. By whatever name the position which the agent occupies may be called, he is the representative of the master, if his duties are those of the master; but, if his duties are not those of the master, then he is no more than a fellow-employe with those engaged in the common service, no matter what may be his nominal rank. *Indiana Car Co. v. Parker*, *supra*; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Krueger v. Louisville, N. A. & C. R. Co.*, 111 Ind. 51; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 33 Am. & Eng. R. Cas. 334; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265; *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 118 Ind. 579, 38 Am. & Eng. R. Cas. 25; *Franklin v. Winona & St. P. R. Co.*, 37 Minn. 409, 31 Am. & Eng. R. Cas. 211; *Anderson v. Bennett*, 16 Or. 515, 38 Am. & Eng. R. Cas.

Negligence of
fellow-ser-
vants.

Superinten-
dents.

87; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592; *Gunter v. Graniteville Manuf'g Co.*, 18 S. Car. 262.

Our judgment is that, at the time the appellant was injured, Torrence, the master mechanic, was performing the master's duty; and not merely the duty of a fellow-servant.

He was in control of the shop where the appellant was working. He was the only representative of the master at that place. Men, machinery, and

Responsibility
for vice-prin-
cipal.

work were under his control. He gave the orders which it was the duty of those under him to obey, and he alone could give orders as the master's representative. He gave the specific order under which the appellant acted. He did not join the appellant as a fellow-servant in doing the work, but he commanded it to be done. He was in the position of one exercising authority, and not in that of one engaged, in common with another, in the same line of service. The obligation to make safe the working-place and the materials with which the work is done rests on the master, and he cannot escape it by delegating his authority to an agent. It is also the master's duty to do no negligent act that will augment the dangers of the service. In this instance Torrence was doing what the master usually and properly does when present in person, for he was commanding, and directing the execution of what he had commanded. By his own act he made it unsafe to do what he had commanded should be done. Acts of the master were therefore done by one having authority to perform them, and the breach of duty was that of one who stood in the master's place. It is not easy to conceive how it can be justly asserted that one who commands an act to be done, and who possesses the authority to command and enforce obedience from all servants employed in a distinct department, by virtue of the power delegated to him by the master, is no more than a fellow-servant; for, in the absence of the master, the command, if entitled to obedience, must be that of the master, conveyed through the medium of an agent. Nor can it be held, without infringing the principles of natural justice, that, if he who is authorized to give the command makes its execution unsafe, the employe whose duty it is to obey has no remedy for an injury received while doing what he was commanded to do. Nor do the better reasoned authorities justify such a conclusion. The decisions are conflicting, it is true, but the decided weight of authority is that, where the act is such as the master should perform, he is liable, no matter by whom the duty is performed. "As to such acts," said the court in *Flike v. Boston & A. R. Co.*, 53 N. Y. 553, "the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed."

In this instance Torrence was not a fellow servant while engaged in commanding work to be done, and directing the execution of the command, although if it had appeared that he was engaged with the appellant in doing the work, within the line of the latter's services, it might perhaps be otherwise. "The true test," said the court in *Gunter v. Graniteville Manuf. Co.*, *supra*, "is whether the person in question is employed to do any of the duties of the master. If so, then he cannot be regarded as a fellow-servant, * * * but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master." The rule thus stated goes further than we are required to do in this instance; for we need go no further than to hold that while engaged in ordering the work to be done, and in supervising its performance, the master mechanic represented his principal. If, however, it had appeared that the master mechanic was not the person in charge of the men, and the shop and its equipments, but was, although a superior agent, engaged in doing the same general work as that for which the appellant was employed, it would be different. As the facts appear in the record, the master had invested the master mechanic with full authority over the appellant and all others employed in the shop under his control; thus bringing the case within the decision in the case of *Atlas Engine Works v. Randall*, 100 Ind. 293, where it was said: "If the agent or servant upon whom the power to command is given exercises the power, and fails to discharge the obligation, to the hurt of the servant, who is without fault, the failure is that of the master, and he must respond." In the case now at our bar, the agent who had the power to command, and who exercised it, himself violated the duty which rested upon him as the representative of his principal, and by his own act of negligence brought injury upon the employe engaged in doing the work he was ordered to do. Although the case of *Hawkins v. Johnson*, 105 Ind. 29, belongs to a somewhat different class from the one to which this class belongs, still what is there said as to the right of an employe to obey the directions of a superior is applicable here, and strongly tends to support our conclusion. What we have said of *Hawkins v. Johnson* applies also to the case of *Rogers v. Overton*, 87 Ind. 410. Many of the cases go much further than we do here, for they assert that an employe is justified in obeying the orders of one who has a right to command, unless the danger of obedience is so apparent that a reasonably prudent man would not assume the risk. *Stephens v. Hannibal & St. J. R. Co.*, 96 Mo. 207, 38 Am. & Eng. R. Cas. 110; *Huhn v. Mis-*

souri Pac. R. Co., 92 Mo. 443, 31 Am. & Eng. R. Cas. 221; *Keegan v. Kavanaugh*, 62 Mo. 230.

Whether these decisions go beyond the true line or not we neither inquire nor decide, but we do affirm that the reasoning, in so far as it covers and is limited to a case such as this, is unanswerable; for here the master mechanic had the right to command, and he was the only person in the shop who could rightfully command, the employes serving under him. The duty of the master mechanic, as it appears from the complaint, was to order what should be done; and this, it has been well decided, is intrinsically the master's act, and not that of a mere fellow-servant. *Theleman v. Moeller*, 73 Iowa, 109; *Braun v. Chicago, R. I., etc., R. Co.*, 53 Iowa, 595. We do not affirm that an employe, with authority to command, may not be a fellow-servant. On the contrary, we hold that one having authority to command may still be a fellow-servant; but we hold, also, that where the position is such as to invest the employe with sole charge of a branch or department of the employer's business, the employe, as to that branch or department, may be deemed a vice-principal, while engaged in giving orders or directing their execution. *Chicago & A. R. Co. v. Hoyt*, 122 Ill. 369, 3 Am. & Eng. R. Cas. 309; *Wabash, St. L. & P. R. Co. v. Hawk*, 121 Ill. 259, 31 Am. & Eng. R. Cas. 306. "Where," it is said in a well-considered case, "a master places the entire charge of his business, or a distinct department of it, in the hands of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect of the agent of ordinary care, in supplying and maintaining suitable instrumentalities for the work required to be done, is a breach of duty for which the master should be held liable." *Cooper v. Pittsburg, C., etc., R. Co.*, 24 W. Va. 37. Substantially the same statement of the rule is made in *Mullan v. Philadelphia & S. Mail Steamship Co.*, 78 Pa. St. 25. This rule applies to the case made by the complaint before us, and it is that case, and that alone, to which our discussion is directed and to which our conclusions apply. If it appeared that the master mechanic worked with the machinists in the shop as a foreman or a like agent ordinarily does, we should have a different case. This, however, does not appear; for, on the contrary, it does appear that the master mechanic was invested with sole control of the shop, and that his duties were not those of a mere workman, but those of one whose duty it was to manage a distinct department, and to give orders to the machinists and other employes as to the duties they should perform. We cannot further comment upon the decisions on this branch of the

case which we have examined, but refer without comment to some of them. *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; *Mayhew v. Sullivan Mining Co.*, 76 Me. 100; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592; *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424; *Central Trust Co. v. Texas & St. L. R. Co.*, 32 Fed. Rep. 448.

It is important to bear in mind that the appellant was performing a special duty enjoined upon him by a superior whom it was his duty to obey. Although the work was within the general scope of his service, nevertheless he was performing it under a special order. It was therefore a wrong on the part of the agent, having the right to order him to do the specific work, to increase the peril of the service by his own negligence. The employe, acting under the specific order, had a right to assume, in the absence of warning or notice, that his superior who gave the order would not, by his own negligence, make the work unsafe. *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 118 Ind. 579, 38 Am. & Eng. R. Cas. 25; *Coombs v. Cordage Co.*, 102 Mass. 572; *Haley v. Case*, 142 Mass. 316; *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass. 461; *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 658, 18 Am. & Eng. R. Cas. 56; *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581; *Reagan v. St. Louis, K., etc., R. Co.*, 93 Mo. 348; *Lewis v. Seifert*, 116 Pa. St. 628. We adhere firmly to the rule declared in such cases as *Indianapolis & St. L. R. Co. v. Watson*, 144 Ind. 20, and *St. Louis, N. A. & C. R. Co. v. Sanford*, 117 Ind. 265, that the employe assumes all the risks incident to the service he enters; but we assert that the rule does not apply where a superior agent, representing the master, orders the employe to do a designated act, and, while the employe is engaged in doing what he was specially ordered to do, that superior, by an act of negligence, causes the employe to receive an injury. The employe in entering the service does not assume a risk created by the negligent act of the master's representative in making unsafe work which he specifically orders the employe to perform. If the master mechanic had been no more than a co-employe working with the appellant, or if the appellant had entered the service knowing that the master mechanic was to work with him, then he would be held to have assumed the risk arising from the master mechanic's negligence while working or acting merely in the capacity of a fellow-servant. We hold that the facts stated in the complaint are sufficient to compel the appellee to answer. Judgment reversed.

Fellow-Servants—Injuries to Laborer Through Negligence of Foreman.—Where the foreman of a gang in the service of a railroad company engaged

in removing stone inside of a railroad car, negligently tells the laborers under him to use a chain which is in bad repair, a laborer injured in consequence of the breaking of such chain, has no cause of action against the company therefor, the negligence being that of the foreman, his fellow-servant. *Kinney v. Corbin*, Pa. Sup. Ct., Feb. 17, 1890.

Same—Car-Repairer and Foreman.—A foreman of car-repairers in the shops of a railroad, who has power to employ and discharge hands, is not the fellow-servant of a car-repairer working under his orders, but is the representative of the company, and the company is liable to the car-repairer for injuries caused by the foreman's negligence. *Missouri Pac. R. Co. v. Williams*, Tex. Sup. Ct., Nov. 5, 1889. *GAINES, J.*, who delivered the opinion of the court, said: "The evidence was sufficient to warrant the finding by the jury that Holmes had the power to employ and discharge hands, and the verdict is conclusive upon that point. The question therefore arises whether he is to be deemed the representative of the company, or a fellow-servant, as to the employes under his control. Upon this question the authorities are conflicting. The courts of many of the states hold that it is only when an employe is charged with a duty which, by its implied contract, a railroad company has undertaken towards its employe, such as furnishing a safe track and machinery, and the employment of careful and skillful servants, and the injury results to another employe from his neglect to perform that duty, that he is deemed the vice-principal of the company, and not the fellow-servant of the injured party. On the other hand, there are numerous cases which hold that the employe who has charge of a special department of a company's business, with power to employ and discharge the servants in his department, is not to be deemed the fellow-servant of those under his control. This rule has been recognized and followed by this court. *Wall v. Railway Co.*, 4 Tex. Law Rev. 37. A servant who has the authority to employ other servants, under his immediate supervision, exercises an important function of his master, and has as full control over them as the master would have, were he present, acting in person. The subordinate, in such a case, is as much the servant of the agent who employs and controls him as he would be of the master, were the latter discharging the functions of his agent. It seems, therefore, that there is as much reason for holding that a servant assumes the risk of the master's negligence as for holding that he assumes the risk of the negligence of such a superior employe of his master. He may be presumed to exercise an influence over a co-employe who did not employ and has no power to discharge him, calculated to promote care and vigilance on part of the latter, which he cannot or dare not exercise towards one who has the right to terminate his employment. There is reason, therefore, for adhering to the previous ruling of this court, and for holding that if the plaintiff in this case was under the immediate control of Holmes, and Holmes had the power to employ and discharge the servants under him, Holmes is to be treated as the representative of the company, and not the fellow-servant of the plaintiff."

Same—Promise of Foreman to Keep Lookout.—The plaintiff, a car-repairer, sued to recover damages for injuries sustained whilst repairing a car. He testified that he was ordered by his foreman to go under and repair a car, which was not on a repair track, but upon a track used by the transportation department in connection with the main track. Plaintiff obeyed the order and, while lying under the car, it was struck by another car, and the wheel of the car he was repairing was driven upon his heel inflicting serious injury. He also testified that before he went under the car, the foreman promised to watch, and to see that he was not injured. He also asked two other employes to watch. The defendant requested an instruction that although the foreman promised to watch for plaintiff, yet if "he

abandoned the watch with plaintiff's knowledge," and plaintiff then continued to work, relying on the promise of the other employes to keep a lookout and protect him, such employes were plaintiff's fellow-servants, and plaintiff could not recover. The court refused to give the charge as requested, and added at its own motion after the word "knowledge" the following: "and that plaintiff knew or ought to have known that the foreman would not by himself or others protect him," and then gave the charge as modified. *Held*, that the instruction as modified was not erroneous, there being no evidence to show that plaintiff knew that the foreman had abandoned the watch, although there was evidence showing that he had left the car under which plaintiff was working, and that plaintiff knew this. *Missouri Pac. R. Co. v. Williams*, Tex. Sup. Ct., Nov. 5, 1889.

Same—Contributory Negligence of Fellow-Servant.—Plaintiff, a car-repairer, was injured while at work under a car. The evidence showed that the foreman car-repairer, and also the yard-master and a switchman, promised to keep a lookout and to protect him from injury. *Held*, that an instruction that if plaintiff when he went to work under the car relied on the assurances of protection made by the yard-master and switchman, and if the former was not in a common employment with the plaintiff, but promised to look out for plaintiff at his request, then they must find for defendant, was properly refused. If the foreman promised to protect plaintiff while at work under the car, and if plaintiff relied upon the promise and the foreman failed to protect him, the employer was not relieved from liability by the failure of the others to keep a lookout as they had promised. *Missouri Pac. R. Co. v. Williams*, Tex. Sup. Ct., Nov. 5, 1889.

LOUISVILLE, NEW ORLEANS & TEXAS R. CO.

v.

PETTY.

(*Mississippi Supreme Court, March 10, 1890.*)

Fellow-Servants—Brakeman—Employe Engaged to Fill Sand-box.—An employe whose duty it is to fill the sand-box of the engine, is the fellow-servant of a brakeman on the train, and the latter cannot recover for injuries sustained in an accident caused by negligence in failing to fill the sand-box, when it does not appear that the company was at fault as to the selection or retention of its servants.

APPEAL from Circuit Court, Williamson County.

Action to recover damages for personal injuries. Plaintiff, a brakeman, was thrown from the train whilst it was ascending a grade, the engine having jerked and slipped because of an insufficient supply of sand in the sand-box. Verdict and judgment were rendered for the plaintiff and the defendant appeals.

W. P. & J. B. Harris for appellant.

D. C. Bramlett and H. C. Capell for appellee.

CAMPBELL, J.—The evidence tends to show that the injury

received by the appellee was caused by the want of sand in sufficient quantity in the sand-box on the engine, but there is no evidence how it came about that the supply of sand was insufficient. Whether the engine was furnished properly, in this respect, at the start, and had exhausted the supply, or started unfurnished, does not appear. If the latter be true, it was because of the failure of duty of that servant of the company whose duty it was to fill the sand-box suitably; and for an injury suffered by reason of the negligence of such fellow-servant the appellee, a brakeman on the train, has no claim on the company; it not being made to appear that it was at fault as to the selection or retention of the servant, or in any other respect as to this service.

Accident
caused by neg-
ligence of fel-
low-servant.

No rule of common law is more universally affirmed than non-liability of the master to one of his servants for an injury caused by the negligence of a fellow-servant engaged in the common service; and it was distinctly announced in this state, more than 16 years ago, that all employes of a railroad company, engaged in merely operative service connected with the carrying on of the business of running trains, are fellow-servants, and that the common employer is not responsible to one of these for injuries caused by the negligence of another. Undoubtedly the "hostler" or yard servant, charged with the duty of supplying the engine before starting it on the road, with fuel, water, sand, or other needed thing, is a mere servant, and not the agent or representative of the master, except in that qualified or subordinate sense in which every servant may be said to be: and if it be true, which has not yet been affirmed in this state, that certain employes of a railroad company are not fellow-servants of the army of employes employed in doing the work of carrying on the business, it would yet be true that the appellee and the laborer whose default is supposed to have led to his hurt were fellow-servants, and no liability attached to the common master. The rule on this subject announced in *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258, (decided in 1873,) and reaffirmed with emphasis in *Howd v. Mississippi Cent. R. Co.*, 50 Miss. 178 (1874,) has remained undisturbed by judicial or legislative enactment, and must be regarded as the accepted doctrine in this state; and we must not be expected to follow the devious ways of those courts which, in bending the rule, which all acknowledge, to effect their ideas of justice in particular cases, have well nigh destroyed the rule itself. This rule, as held in this state, and in several other states of the United States, and in England, is a simple one, just in its principle, politic in its application, because conservative of life and property, and easily understood

and applied, while all efforts to vary and qualify it have involved courts undertaking it in endless contradictions and difficulties.

The writer of this opinion was at the bar, and was sought to be employed to bring the action of *Railroad Co. v. Hughes*, cited above, and after careful consideration of the case, with the facts before him, declined to act as counsel, on the ground that the law was believed to be against the right to recover on those facts; which circumstance is mentioned to show that, before any announcement of the law on this subject in this state, the writer had reached the conclusion afterwards announced in the very case which had been offered him as counsel and declined. This conclusion was based on the law of master and servant as laid down in books which were accessible. The case was not tried on the principles announced in this opinion, and a new trial must be had.

Reversed and remanded.

Negligence of Fellow-Servants—Failure to Light Headlight.—A track repairer was injured by a train running into a handcar upon which he was returning home from work. The evidence showed that the headlight of the locomotive was not lighted. *Held*, that the negligence of the person whose duty it was to light the headlight was the negligence of a fellow-servant, and that the plaintiff could not recover. *Collins v. St. Paul & S. C. R. Co.* (Minn.), 8 Am. & Eng. R. Cas. 150.

Where, through the fault of the persons in charge of the train, the headlight is not exposed in front of the engine during foggy weather, as expressly required by a rule of the company, the company is not responsible for the negligence of such persons, to a repair man who is injured in consequence thereof. *Pennsylvania R. Co. v. Wachter* (Md.), 15 Am. & Eng. R. Cas. 187.

MURRAY

v.

ST. LOUIS CABLE & WESTERN R. CO.

(*Missouri Supreme Court, November 10, 1889.*)

Fellow-Servants—Cable Railway—Watchman and Gripman of Car.—A person employed by a cable railway company to guard a crossing, to prevent injuries to persons crossing the tracks, and to signal approaching cars to stop and start so that they should not pass each other upon a curve, is a fellow-servant of the gripman of a car.

APPEAL from St. Louis Circuit Court.

Action to recover damages for negligently causing the death of plaintiff's husband. A demurrer to the evidence

was sustained at the close of plaintiff's case, and the plaintiff appeals.

A. R. Taylor for appellant.

P. H. Kern for respondent.

BLACK, J.—This is a personal damage suit, and the only question is whether the court erred in sustaining a demurrer to the evidence at the close of the plaintiff's case.

Facts.

The defendant owned and operated a cable street railroad in the city of St. Louis; and the plaintiff's husband, James Murray, was in the defendant's employ as a watchman at the corner of Fourteenth and Wash streets. The defendant's two tracks at that point make a short curve. It was the duty of Murray to guard the crossing, and to prevent injuries to persons crossing the tracks, and to signal the approaching cars to stop and start, so that they would not pass each other upon the curve. Beyond this, he had nothing to do with the operation of the cars. The evidence tends to show that in the night-time, and while Murray was in the discharge of his duties at the curve, he signaled two of defendant's approaching cars,—the one to stop and the other to move on around the curve. The car signaled to stop, through the negligence of the gripman in charge of it, failed to stop, and the gripman let it go forward until it run over and killed Murray. Murray was exercising ordinary care.

The only question presented by this statement is whether the negligent gripman and the deceased were fellow-servants within the rule that exempts the master from liability for injuries occasioned by one servant to a fellow-servant.

**Fellow-servants—
Watchman
and gripman.**

The defendant cites and relies alone upon the case of *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588, 21 Am. & Eng. R. Cas. 509. In that case the plaintiff was a car-repairer, and was injured by the negligence of his foreman. The principle which that case turned upon was this: that, where the master has intrusted to a foreman power to superintend, direct, and control work, the foreman, in the exercise of such powers intrusted to him, is a representative of the master, and for that reason not a fellow-servant. There is no evidence in this case that the gripman occupied the position of a vice-principal, and of course the plaintiff here cannot recover on any such ground. The plaintiff cites and relies alone upon *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 301, 8 Am. & Eng. R. Cas. 106, and *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 114. In the *Hall Case*, the plaintiff, who was switchman, brought this suit to recover damages for injuries received by reason of a loose iron rail

left upon the track by the negligence of a section foreman. It was then said: "The principal ground relied upon for a reversal of the judgment which the plaintiff recovered is that a switchman and a section foreman are fellow-servants. Adjudications of the courts of other states of the Union sustaining the appellant's position are cited by counsel; and whatever our opinion might be, if it were a question of the first impression in this court, the contrary was held in *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; and the doctrine of that case has been adhered to by this court, and we are not inclined to depart from what must therefore be now accepted as the rule settled on that subject in this state." The case of *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567, 17 Am. & Eng. R. Cas. 583, which is cited in the *Sullivan Case*, was a suit by a brakeman to recover damages occasioned by reason of a defective hand-hold on the top of a box-car. The court in that case observed: "The third refused [instruction] declares that car-inspectors, at the intermediate stations, were fellow-servants of plaintiff, and that, if the proximate cause of plaintiff's injury was attributable to any want of care or caution on their part, defendant was not liable. Car-inspectors are not co-employees with trainmen. *Long v. Pacific R. Co.*, 65 Mo. 225." These observations must be considered in the light of the facts then before the court, and of the cases which are there cited. When this is done, it will be seen that the *Hall* and *Condon Cases* turn upon the principle of law that it is the duty of the railroad company to furnish a safe road and cars. This duty requires the company to use due care in keeping the road and cars in repair. If this duty is devolved upon servants, their negligence in respect thereto is the negligence of the company. The doctrine sometimes asserted, that when the company employs competent inspectors and repairers it was not liable for injuries resulting to employees through the negligence of such inspectors and repairers, is denied in *Long v. Railroad Co.*, *supra*; and the doctrine is there asserted that the carelessness of such persons in the performance of such duties is not put upon the footing of that of a fellow-servant, but such negligence is that of a representative of the company,—the negligence of the company itself. And to the same effect is *Bowen v. Chicago, B. & K. C. R. Co.*, 95 Mo. 273, and other cases.

There is in the present case no evidence or claim that defendant failed to use proper care in respect of any of the appliances; and the cases cited by plaintiff are without application, lest it be the case of *Sullivan v. Railway Co.*, *supra*. In that case the husband of the plaintiff was a track-walker, and was run over and killed by reason of the negligence of the

engineer and fireman of a through passenger train. It was held in one branch of the case that the engineer and fireman were not fellow-servants, because engaged in different departments of the general business of the defendant. But it is difficult to see how that case can help the plaintiff here. It was the duty of Sullivan to walk back and forth over a section of four miles, and to see that his section of the road was in repair. He had nothing to do with the operation of the train, and he and the trainmen were under different directing agents of the company. Here it was the duty of the deceased to keep watch of the cars as they approached the curve, and to give signals to the gripman, so that only one train should pass the curve at a time. The negligent gripman and the deceased were both employed in operating the car,—one from the car, and the other from his station on the ground. They were engaged in the same department of work, and their common business was such that one could exercise a preventative care over the other. They were evidently servants employed in the same common employment.

The writer of this and the opinion in the Sullivan Case feels in duty bound to say that the cases cited in that case, when properly considered, do not sustain the doctrine there announced; namely, that the servants are not in the same common employment when engaged in different departments of the general business of the company. The cases cited stand on the ground that it is the duty of the master to use due care in furnishing the instrumentalities with which the servant is to perform his work, and that duty is personal to the master. It does not follow, however, that the ruling in the Sullivan Case is to be disturbed. The majority of the courts, it is believed, hold that servants are in a common employment when they are engaged under the same master in the same general business. The rule of exemption as declared in the case of *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49, and followed in many other cases, has been much modified in this state, in so far as it relates to servants occupying different grades, so that the master is liable for the negligence of those who are clothed with power to superintend and direct subordinates. *Smith v. Wabash, St. L. & P. R. Co.*, 92 Mo. 359, 31 Am. & Eng. R. Cas. 331. Many well-considered cases go still further, and restrict the exemption of the master from liability to those cases where the servants are engaged in the same department of the general business, and are in a position to have an influence over each other's conduct. *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302. Other cases in that court are collected in 1 Shear. & R. Neg. (4th Ed.) § 238; *Cooper v. Mullins*, 30 Ga. 150; *Railroad Co.*

v. Jones, 9 Heisk. (Tenn) 27; Northern Pacific R. Co. *v.* O'Brien (Wash. T.), 21 Pac. Rep. 32. But under either line of authorities the plaintiff in the present case cannot recover, and we say no more upon the subject at the present time. .

The judgment is therefore affirmed.

RAY, C. J., absent. The other judges concur.

Fellow-Servants—Bridge-Watchman and Engineer and Conductor.—A watchman upon a railroad bridge and the engineer and conductor of a train who work under the immediate direction of different foremen and are engaged in different departments of the defendant's service, are not fellow-servants, and the watchman is entitled to recover damages for injuries caused by the negligence of the train hands. *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. THAYER, J., said: "If the question now under consideration was to be determined solely with reference to the rule of liability which has the sanction of the court of last resort in this state, there is no doubt that the court would be compelled to hold that the plaintiff and the trainmen—that is, the engineer and conductor of the passenger train—were not fellow-servants in such sense as to exempt the defendant from liability to the plaintiff for the trainmen's negligence. In the case of *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 114, a section boss was run over and killed in consequence of the negligence of an engineer in charge of a train. The negligence of the engineer appears to have consisted in the fact that he failed to keep a proper lookout, and failed to give a proper warning of the approach of the train. It was held that the company was liable for the negligent act in question, as the engineer and section boss did not at the time occupy the relation of fellow-servants. The decision in the *Sullivan Case* was referred to and criticised in some respects in a later case decided by the same court, to-wit, *Murray v. St. Louis, C. & W. R. Co.*, *ante*, p. 446, (not yet officially reported.) Though criticised in some respects, I understand the court to adhere to the general doctrine underlying the decision, that, when working independently of each other in their respective departments of the general service, and under the immediate control of the different officers or foremen, trainmen and trackmen are not to be regarded as fellow-servants, within the meaning of the rule exempting the company from liability. A similar doctrine prevails in the state of Illinois. A foreman of a party of track repairers or sectionmen, while engaged in the discharge of his duties, was killed by a large lump of coal carelessly dropped by a fireman from the tender of a passing train. It was held, in an elaborate opinion, that the defendant company was liable to the personal representatives of the deceased for the negligent act in question. *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 303. The decision in this case expressly holds that persons employed in different departments of the same general service, and under the immediate supervision of different officers or foremen, and who do not co-operate with each other in such manner as to bring them together, so that they can exercise a cautionary influence over each other, are not fellow-servants. In the case of *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258, Mr. Justice MILLER held, in this circuit, that a laborer employed in the business of track-laying, under the orders of a section foreman or boss, was not a fellow-servant with persons engaged in running and managing a switch-engine, that was not being used in connection with the business of track-laying, in which the laborer was engaged. In the case of *Howard v. Delaware & H. Can. Co.*, 40 Fed. Rep. 195, the United States circuit court for the district of Vermont held that track-men, when engaged in their own department of the general service, are not fellow-

servants with trainmen engaged in their department, in such sense as to exempt the master from liability to the former, for injuries sustained by reason of the negligence of the latter. To the same effect is the decision in *Northern Pac. R. Co. v. O'Brien* (Wash. Ter.) 21 Pac. Rep. 32. So far as I am advised, the precise question now under consideration has never been decided by the supreme court of the United States. The case of *Randall v. Baltimore & O. R. Co.*, 109 U. S. 482, 15 Am. & Eng. R. Cas. 243, cited by defendant's counsel, merely holds that trainmen employed on one train in a railroad yard, are fellow-servants with trainmen on another train of the same company that is being operated in the same yard. The case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, which has sometimes been cited in support of the proposition that persons employed in different departments of a given service are not fellow-servants, although the general object to be accomplished by the service is the same, and the employer the same, in reality only decides that the conductor of a train, who has authority to control its movements, stands in the relation of a vice-principal to other employes on the same train. The case appears to have no immediate bearing on the question how far the fact that persons are employed in different departments of the same service, and under different foremen, will destroy the relation of fellow-servant that operates to relieve the master from liability for their negligence. In some of the cases above cited, particularly in *Chicago & N. W. R. Co. v. Moranda* and in *Murray v. St. Louis, C. & W. R. Co.*, it is conceded that the majority of the cases in this country and in England hold, and such is no doubt the fact, that persons are in the same common employment, and hence are fellow-servants, within the meaning of the rule exempting the master from liability to a servant for the negligence of a fellow-servant, when they are engaged in the same general business, aiming at one general result, and the employer is the same, although they work in different departments of the general service. *Shear. & R. Neg.* (4th Ed.) §§ 235, 239, and cases cited. There is a numerous class of cases to be found in the books where the master has been held liable to an employe for the negligence of a fellow-servant, on the ground that, in the particular matter complained of, the servant in default was the immediate representative of the master in the performance of some duty which the master owed to the injured employe, as where servants deputed by the master to supply and keep in repair suitable tools, machinery, and appliances wherewith other employes are to work, are negligent in the performance of such duties. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 646, 24 Am. & Eng. R. Cas. 407, and cases cited; *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Davis v. Central Vermont R. Co.*, 55 Vt. 84, 11 Am. & Eng. R. Cas. 173; *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 2 Am. & Eng. R. Cas. 94; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 301, 8 Am. & Eng. R. Cas. 106. The decisions in this class of cases are grounded on the principle, now well settled in this country, that an employer cannot escape liability, even to an employe, for the non-performance, or negligent performance, of a duty that he owes to an employe, merely by intrusting its performance to some other servant or agent. Notwithstanding the fact that those cases really have no bearing on the question who are fellow-servants, within the meaning of the rule exempting employers from liability to servants for the negligence of fellow-servants, yet it is probable, from the manner in which this class of cases is sometimes cited, that they have occasioned some confusion, and it is even possible that in a few instances they have induced some courts, in opposition to the general current of authority, to hold a master liable to a servant for the negligent act of a fellow-servant, merely because they were employed in different departments of the same general service, even where the negligence complained of did not consist in

the neglect of some duty which the law especially devolves on the master. But, be this as it may, the decision in this circuit in the case of Garrahy v. Kansas City, St. J. & C. B. R. Co., *supra*, supplemented as it is by the decision in Sullivan v. Missouri Pac. R. Co., *supra*, compels me to hold in the case at bar, that the plaintiff and the trainmen, to whose negligent act the injury complained of is imputed, were not fellow-servants. They were engaged in different departments of the defendant's service, and worked under the immediate direction of different foremen. In the discharge of their several duties, they did not co-operate in such manner as to exercise an influence over each other's acts to any greater extent than trainmen and trackmen usually co-operate, and, according to the authorities last cited, cannot be regarded as fellow-servants. It results from this view that there was no error committed in refusing defendant's fifth request."

HUNN

v.

MICHIGAN CENTRAL R. CO.

(*Michigan Supreme Court, December 28, 1889.*)

Fellow-Servants—Train Dispatcher and Fireman.—A train dispatcher, who has control of a railroad or division thereof so far as the running and operating of trains thereon is concerned, and whose directions it is the duty of all employes on the train to obey, is not the fellow-servant of a fireman upon a train which is being operated under his direction.

Same—Contributory Negligence—Cause of Injury.—Where an employer has been guilty of negligence, causing an injury to one of his servants, the fact that the negligence of a fellow-servant contributed to cause the injury, will not bar a recovery.

Negligently Causing Death—Expectancy of Life—Evidence.—In an action to recover damages for negligently causing the death of plaintiff's intestate, the mortality tables found in section 4245, How. Mich. St., are admissible in evidence for the purpose of proving the deceased's expectancy of life.

Same—Evidence—Extent of Deceased's Means.—In an action to recover damages for causing the death of plaintiff's intestate, evidence of the extent of the means of the deceased and his family is not admissible.

Excessive Damages—Review of Verdict on Writ of Error.—Whether damages found by a jury are excessive or not is not a question of law, and if no improper testimony of the subject of damages has been admitted and the jury have been properly instructed, the amount of the damages awarded is beyond the reach of a writ of error.

ERROR to Circuit Court, Jackson County. *

Action by Alice M. Hunn, as administratrix of George Hunn, deceased, against the Michigan Central R. Co. to recover damages for negligently causing the death of her intestate. Defendant brings error to review a judgment for the plaintiff.

Gibson & Parkinson and *H. M. Campbell*, (*Ashley Pond*, of counsel), for appellant.

Hammond, Bartworth & Cobb, (T. A. Wilson, of counsel), for appellee.

CHAMPLIN, J.—About three o'clock on the morning of December 30, 1885, engine No. 120, with a way-car under the charge of W. D. Loomis as conductor, and Samuel Maitland as engineer, and George Hunn as fire-Facts.man, left Bay City, going south, with orders to run wild to Rives Junction, over the Jackson, Lansing & Saginaw Railroad, leased and operated by the defendant company. On the same morning engine No. 177, without any train, was proceeding north over the same road, under the charge of Nilson Napier as conductor, Robert Mills, engineer, and Thomas Looney, fireman. Both engines were run under orders by telegraph from one Kilner, a train dispatcher of Bay City. It was the duty of Kilner, as train dispatcher, to establish a meeting point for these two engines, under a rule adopted by the defendant company which reads as follows: "Rule 133. When an order is given by telegraph for two or more trains to meet at a station, the train dispatcher must first order the green signal displayed at such meeting point by the operator, and receive assurance from him that the signal has been displayed before giving orders to either train. In ordering one train to be held for another, the dispatcher will order each train held for the other." Kilner established such a meeting point at Saginaw City, and notified engine 120 of that fact, but neglected to notify engine No. 177, and gave no order to hold this engine at that point. Napier, the conductor of No. 177, reached Saginaw City, and saw the green signal, and found the order there to hold W. D. Loomis, conductor of No. 120, but no order for himself. He received his clearance, and proceeded north three or four miles, and met engine No. 120 upon a curve at about 3 deg. and 20 min. The respective engines were running at from 10 to 12 miles an hour. The collision resulted fatally to Hunn. At the time a thick fog was prevailing, the night was dark, and the view at the curve was obstructed by houses and other objects, which prevented the approaching engines from being seen from each other a distance of from three to four car-lengths. The accident occurred within the limits of the Saginaw yards. The time-card rule, which was well known to all employes of the company, required "that trains will run carefully, and under full control, through all yards, and irregular trains must keep sharp lookout for switching engines." The plaintiff recovered a judgment in the court below, and the defendant asks its reversal upon several grounds, the principal of which are the following: "(1) The declaration

was insufficient, in not setting forth with more particularity the duty of the defendant, the breach of duty which caused the accident, and the cause of the accident. (2) The only negligence proved upon the trial was that of the train dispatcher, and no recovery can be had, for the reason that his negligence was that of a fellow servant. (3) The testimony relative to damages, and the charge of the court in reference thereto, were erroneous."

The declaration was not demurred to. It states a cause of action, and is sufficient after verdict.

The second ground above stated, if sustained, prevents a recovery in the action, and raises the most important point in the case. The court long ago announced and has steadily adhered to the doctrine that a master is not liable to a servant for injuries received through the negligence of a fellow-servant while engaged in a common employment. *Michigan Cent. R. Co. v. Leahey*, 10 Mich. 193; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510; *Michigan Cent. R. Co. v. Austin*, 40 Mich. 247; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Day v. Toledo, C. S. & D. R. Co.*, 42 Mich. 523, 2 Am. & Eng. R. Cas. 126; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230; *Smith v. Potter*, 46 Mich. 258; *Henry v. Lake Shore & M. S. R. Co.*, 49 Mich. 495, 8 Am. & Eng. R. Cas. 110; *Greenwald v. Marquette, H. & O. R. Co.*, 49 Mich. 197, 8 Am. & Eng. R. Cas. 133; *Ryan v. Bagaley*, 50 Mich. 179; *Gardner v. Michigan Cent. R. Co.*, 58 Mich. 590, 24 Am. & Eng. R. Cas. 435. The rule is a salutary one in all cases of fellow-servants where the master has exercised due care in the selection of competent employes, and has become pretty generally recognized by the courts of last resort in this country. But the question of who are fellow-servants still perplexes the judicial mind, and gives rise to a great diversity of opinion. Some courts go so far as to hold that, if the master exercises due care in selecting employes, his full duty towards his servants is discharged, even though he selects one or more agents to represent him in overseeing, he controlling and carrying on the business, however large and extended it may be, if he retains the right of employing and discharging his servants. Others hold that so long as they are employed and paid by the same master, and are engaged in a common enterprise, they are fellow-servants. But this is the extreme, and denies substantially all liability of the master in a vast majority of cases where enterprises of any considerable magnitude are carried on. Perhaps no satisfactory rule has yet been formulated

by which it may in all cases be determined who are fellow-servants, in such sense as to shield the master for the negligence of his servant. We may start, however, where the rule is clear that a master is liable to his servant for an injury caused by his own negligence. The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego*, and the master is as responsible for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself. It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his employes, through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons. Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's) over the action of the employes engaged in carrying on a particular branch of the master's business, and acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employes to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls. In *Quincy Mining Co. v. Kitts*, 42 Mich. 39, this court said: "This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and, if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence. The same is true of the general supervision of his business. If there is negligence in this, the master is responsible for it, whether the supervision be by the master in person, or by some manager, superintendent, or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority." It was upon this principle that in *Ryan v. Bagaley*, 50 Mich. 179, this court held the owner of a mine liable for the negligence of the mining captain. The question was made to turn upon whether the mining captain was intrusted with the management of the mine without in-

terference. If he was, in respect to legal responsibility his negligence was the negligence of the defendant.

It now becomes pertinent to inquire what the duties of Kinler, the train dispatcher whose negligence caused the death of the fireman, Hunn, were. The division superintendent's name was W. A. Vaughn. In receiving dispatches from the train dispatcher, the

**Duties of
train dis-
patcher.**

conductors and engineers never act upon them unless signed with the initials "W. A. V." Dispatches delivered by the operator so authenticated were considered authoritative, and were acted upon. Mr. Hair was the chief train dispatcher at Bay City, and he had six train dispatchers under his supervision in the Bay City office, only one of whom, however, was on duty at a time. He testified that the train dispatchers signed the initials "W. A. V." to their dispatches, and were authorized to do so, and that the division superintendent, Mr. Vaughn, never sees them at all, and knows nothing about them, and does not even know the instructions in regard to train dispatchers. He was asked: "*Question.* Who has the control of trains on the Jackson, Lansing & Saginaw division, or who did have at the time of this accident?" *Answer.* Mr. Kilner in regard to moving them backwards and forwards; the entire charge at that time; nobody else has any right to interfere." He further testified that no more than one person has control of the trains at any one time, and no other train dispatchers would have the right to interfere, not even the division superintendent, or the superintendent, or the president of the company, unless they wanted to relieve the train dispatchers themselves. If they wanted to take his program, and sign it, by these orders they could do so; they have the authority. They would have to receipt for it, and take upon themselves the duties. Rule 124 of the company reads as follows: "The general and assistant superintendent, the division superintendent, and the train dispatchers on duty are the only persons authorized to move trains by special order, and but one person on the same circuit shall be permitted to move trains by special order at the same time." Rule 127 is as follows: "The train dispatcher on duty will have full power to run any train or engine by telegram that he may think proper. No irregular train or engine will be allowed to run upon the road, either upon a single or double track, without his knowledge and instructions, unless they can follow a regular train under a red flag, and then only to a station where they can obtain an order," etc. Mr. Vaughn, the division superintendent over the division of defendant's road, testified as follows: "*Question.* Do you do the dispatching or giving of orders for the running of trains

upon the road? *Answer.* I don't. *Q.* In the system of doing business upon your road, what persons—I do not refer to their names—but what persons have charge in telegraph management of trains—had at that time. *A.* The train dispatcher. *Q.* When a train dispatcher is engaged in the duty of dispatching trains upon the line, what other persons have rights or powers there, so far as interfering. *A.* No other."

It is thus seen that the train dispatcher has absolute control over the division of the road from Rives Junction to Mackinaw, so far as the running and operating trains thereon is concerned. It is his province to direct, and it is the duty of all employes operating trains to obey. This is the most important branch of the railroad service, and is the highest exercise of the franchise conferred upon railroad corporations. It is the corporation who does it, through the train dispatcher. This officer, by rule 124 above quoted, is ranked with the general, the assistant, and the division superintendents, and by rule 127 he is given supreme control. To say that such an official, exercising such control, is a fellow-servant with those whom he directs, ignores all distinctions between master and servant. If his act is not the act of the master, then no railroad corporation ever ran and operated a railroad. In *Darigan v. New York & N. E. R. Co.*, 52 Conn 285, 23 Am. & Eng. R. Cas. 438, there were two irregular trains, going in opposite directions, on the western division of defendant's road, which were run as directed by the telegram from the train dispatcher in the division superintendent's office at Hartford. He ordered the east bound train to run to Waterbury until 6 o'clock. Soon after he was relieved, in the regular course of business, by an assistant, who, a little before 5 o'clock, sent an order to the west bound train at Waterbury to run to Brewster's. In obeying this order the trains collided, and the plaintiff was injured. The negligence of the train dispatcher was admitted, but it was claimed by the defendant that such negligence was the negligence of a fellow-servant. In deciding this question, the court said: "It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service." And the court further said: "Cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as con-

Train dispatcher is vice-principal.

structively present, and in which some one must be invested with a discretion and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience—some one must hear and obey. * * * It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. * * * Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them—a train dispatcher acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer? The duty of the former pertains to management and direction; that of the latter to obedience." The case of *Smith v. Wabash, St. L. & P. R. Co.*, 92 Mo. 359, 31 Am. & Eng. R. Cas. 331, was very similar to the one under consideration, and the supreme court of Missouri held, after a consideration of authorities, that this railroad company was liable for the negligence of its train dispatcher which resulted in the death of one of the servants of the company. The following cases are to the same effect: *Sheehan v. New York Cent. & H. R. R. Co.*, 91 N. Y. 332, 12 Am. & Eng. R. Cas. 235; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38; *Pittsburg, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 552, 5 Am. & Eng. R. Cas. 529; *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.), 638; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501; *Phillips v. Chicago, M. & St. P. R. Co.*, 64 Wis. 475, 23 Am. & Eng. R. Cas. 453; *St. Joseph R. Co. v. Kanaley*, 39 Kan. 1; *McKinne v. California So. R. Co. (Cal.)*, 21 Am. & Eng. R. Cas. 539; *Gravelle v. Minneapolis & St. L. R. Co.* 10 Fed. Rep. 711; *Gilmore v. Northern Pac. R. Co.*, 18 Fed. Rep. 866, 15 Am. & Eng. R. Cas. 304; *State v. Malster*, 57 Md. 287; *Murphy v. Smith*, 19 C. B. (N. S.), 361; *Malone v. Hathaway*, 64 N. Y. 5; *Moran's Case*, 44 Md. 283; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Dobbin v. Richmond, etc. R. Co.*, 81 N. Car. 446; *Cowles v. Richmond & D. R. Co.*, 84 N. Car. 309, 2 Am. & Eng. R. Cas. 90; *Dowling v. Allen*, 74 Mo. 13; *Slater v. Jewett*, 85 N. Y. 61.

In holding that the train dispatcher is not a fellow-servant with the fireman, I do not consider that I run counter to the doctrine, so often recognized by this and other courts, in relation to fellow-servants, in which, broadly stated, it is said:

"It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. The rule is the same, though the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object." This cannot be applied when the superior causing the injury represents the master, and it is always a subject of inquiry to ascertain the nature and extent of the authority of the superior whose negligence caused the injury. If his authority and duties are such as the master must necessarily, either personally or by another exercise and discharge, then the above rule does not apply. There are some authorities which hold that a train dispatcher, and those operating trains under his control, are fellow-servants. It seems to me, however, that those authorities do not give sufficient prominence to the position which the train dispatcher occupies in operating a railroad. He is the corporation for the time being, and exercises powers which neither the superintendent, nor the president, nor any other officer or agent of the corporation, can interfere with.

The defendant requested a charge to the effect that, although the jury might find the defendant guilty of negligence, yet if the fellow-servant of deceased contributed to produce his death the plaintiff could not recover. This request was rightly refused. The correct rule, and the reason for it, is stated in *Paulmier v. Erie R. Co.*, 34 N. J. Law 151, as follows: "The servant does not agree to take the chance of any negligence on the part of his employer, and no case has gone so far as to hold that where such negligence contributes to the injury the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence, to defeat a right of action, must be that of the party injured." *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; *Keegan v. Western R. Co.*, 8 N. Y. 175; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; 2 *Thomp. Neg.* 981; *Perry v. Lansing*, 17 Hun (N. Y.), 34; *Busch v. Buffalo Creek Co.*, 29 Hun (N. Y.), 112; *Gray v. Philadelphia R. Co.*, 24 Fed. Rep. 168, 22 Am. & Eng. R. Cas. 351. The second count of the declaration was based upon the negligence of defendant in employing an incompetent train dispatcher, and quite an amount of testimony was introduced in the case in the effort to prove that fact. But this count, upon an intimation of the court, was practically abandoned. The defendant insists that the testimony introduced

Contributory
negligence of
fellow-ser-
vant.

under that count remained in the case, and was prejudicial to it. We do not see anything in the testimony upon this branch of the case that could have possibly prejudiced the jury. The testimony introduced tended to show the capability of Kilner, and the care and caution exercised by defendant in selecting him for the position. Its tendency was favorable to the defendant.

Under defendant's claim of contributory negligence of a fellow-servant's running the trains, in violation of the rules of the company as to speed, testimony was admitted by the court tending to show that a strict compliance with the rules was impracticable, and that they were lived up to as nearly as they could be, and the trains run on the time allowed by the schedule prepared by the company. We think it was competent to show what was usually and habitually done in the running of trains, because, if the company permitted or had so framed the rules as to require the employes to exercise some discretion in the matter of strict obedience, it ought not to be permitted to hold its employes to the very letter of the rule in order to shield the company from liability for what it had tacitly permitted. But the admission of such testimony could not harm defendant, if it was the company's negligence that was the proximate cause of the injury, although a concurring cause was the negligence of a fellow-servant in running at a greater rate of speed than the rules allowed. The court gave full effect to the rules in his charge to the jury, so far as they were material, by instructing the jury that "if you find, as a matter of fact, that the collision resulted entirely from the negligence of one or both of the engineers of engines No. 120 and 177, the defendant is not chargeable with the consequence of that negligence."

There was testimony introduced tending to show that the deceased was earning \$900 a year at the time of his death, and was 27 years of age. A witness was then introduced, and he was permitted to testify that he had made a computation of the present value of an annuity based upon the expectancy of life of a man of the age of 27 years on an income of \$900, and that its present value was \$10,725.30. The court also, against defendant's objections, permitted the mortality tables found in section 4245, How. St., to be admitted in evidence, and the Northampton tables for showing the present value of a dower interest or of an annuity, found upon page 142 of Cheever's Probate Law. Mrs. Hunn also testified that her husband's earnings were her only means of support; that he owned a place at the time worth about \$2,000. She was also permitted to testify, against defendant's objections, that there was an in-

Evidence—
Expectancy
of life.

cumbrance upon the place of \$1,100, or \$1,200. There was also considerable testimony introduced as to his physical health, and as to his being afflicted with varicose veins, and varicose tumors, and how such diseases would impair his health or affect the probable duration of his life. Upon the question of damages the court, among other things, instructed the jury as follows: "Now, in estimating her pecuniary loss, you should consider the personal character of her deceased husband, as shown by the evidence; his mental and physical capacity; his habits as to industry, economy, or otherwise; his health,—whether at the time of his death he was afflicted with any disease, or physical infirmity, as varicose veins, which would be likely to reduce his earning power in the future, or shorten his life; consider his capability, disposition, to earn money, as shown by the evidence; the salary he was then earning, and the amount, whether greater or less, which, under the testimony, you think he would, with reasonable probability, be likely to earn in the future; the probable length of time he would continue to live and earn money, and furnish his wife with support, or other pecuniary advantages; and for this purpose you may consider the evidence of the mortuary tables, or expectancy of life, given you from the statute by Mr. Birney, considering, in the same connection, how much that natural expectancy for the life of a man might be reduced by the circumstances of his physical infirmity of varicose veins, as shown by the evidence. But you must not consider Mr. Birney's computation, based upon the annuity tables, of how much money it would take to purchase an annuity, as testified to by him. That evidence I understand to have been withdrawn from your consideration. At all events, gentlemen, you will give it no weight in determining your verdict. These, and all other facts, conditions, and circumstances appear in the evidence, which tend to throw light upon or aid you in reaching a fair and just conclusion as to the amount of her pecuniary loss, you may and should consider in making up your verdict. Now, the pecuniary benefits which Alice M. Hunn would, with reasonable probability, have realized, by being his wife during the length of time that relation would have continued if he had lived, she has lost by his death; and these benefits, fairly and justly estimated by you with reference to their pecuniary value, under all the evidence in the case and the instructions I have given you, will furnish the measure of her pecuniary injury in this case. The question is not what he might have earned or saved if he had lived, but it is what she, as his wife, would have realized if his death had not occurred from the collision." The mortuary tables contained in Howell's Statutes were

properly admitted in evidence, as some testimony tending to show Hunn's expectancy of life at the age of 27. *Balch v. Grand Rapids & I. R. Co.*, 67 Mich. 394. Such tables are not conclusive. They show the probable age which a healthy person may expect to reach, whose age is given. But when that is before the jury, and the physical condition of the person at the time of his death, and all testimony which may reasonably affect his duration of life, the jury must determine from the testimony before them the probable duration of the decedent's life had he not died as a result of his injury. The testimony of Birney was properly excluded, and the jury told not to regard it. His figures showed the value of Hunn's life to be \$10,725.30. The jury found the plaintiff's damages to be \$7,500, and this sum the defendant's counsel insists is excessive. Whether damages found by a jury are excessive or not does not present a question of law. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions to guide them in reaching a conclusion, the amount of the damages awarded is beyond the reach of a writ of error.

The court erred in admitting testimony showing the extent of their means, and the incumbrance upon the land. When the question was objected to, the court said he would admit it as showing the extent of their means. In *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 214, Mr. Justice COOLEY said: "What the family would lose by the death would be, what it was accustomed to receive, or had reasonable expectation of receiving, in his life time; and to show that the family was poor has no tendency towards showing whether this was or was likely to be, large or small. One man contributes liberally in aid of his poor relations, another delights in contributing luxuries where comforts are already abundant, but when the contribution is cut off in either case the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by a poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount must, when lost, be compensated to the same extent, whether the loser be rich or poor." We cannot say that this testimony did not influence the jury. It was admitted as having some bearing upon the measure of damages, and it must be presumed that it formed an element in the estimation of damages by the jury. The instruction to allow merely nominal damages, so far as the brother and sisters were concerned, was correct. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 205. For the error pointed

Evidence—
Extent of
plaintiff's
means.

out the judgment must be reversed, and a new trial granted.

SHERWOOD, C. J., and CAMPBELL and MORSE, JJ., concurred with CHAMPLIN, J., LONG, J., did not sit.

Evidence—Expectancy of Life—Scientific Work.—Where a witness who "had something to do with" a book which is offered in evidence, identifies it as "a standard and scientific work," it is admissible for the purpose of showing the expectancy of life. *Gorman v. Minneapolis & St. L. R. Co.*, Iowa Sup. Ct., Oct. 16, 1889.

Who are Fellow-Servants of Train Dispatchers.—See *Phillips v. Chicago, M. & St. P. R. Co.* (Wis.), 23 Am. & Eng. R. Cas. 453; *Darrigan v. New York & N. E. R. Co.* (Conn.), 23 *Id.* 438; *Smith v. Wabash, St. L. & P. R. Co.* (Mo.), 21 *Id.* 331. *McKune v. California S. R. Co.* (Cal.), 17 *Id.* 589, note 591; *Blessing v. St. Louis, K. C. & N. R. Co.* (Mo.), 15 *Id.* 298, note 300; *Robertson v. Terre Haute & I. R. Co.* (Ind.), 8 *Id.* 175; *Chicago, St. L. & N. O. R. Co. v. Doyle* (Miss.), 8 *Id.* 171; *McLeod v. Ginther* (Ky.), 8 *Id.* 162; note 33 *Id.* 268.

CHICAGO, BURLINGTON & QUINCY R. CO.

v.

SULLIVAN.

(*Nebraska Supreme Court, October 22, 1889.*)

Negligently Causing Death—Instructions—Distinction between Acts of Vice-Principal and Fellow-Servant.—In an action by an administratrix to recover damages for the death of the decedent, a charge that "the jury are instructed that, if they believe from the evidence that the deceased came to his death through the wrongful act, default, or negligence of defendant, or its servants or employes, and not through his own wrongful act or negligence, then they will find for plaintiff, and assess her damages at such sum as they believe from the evidence she should recover not exceeding the sum claimed in her petition," is too broad and indefinite, and fails to distinguish between the acts of a vice-principal and fellowservant.

Vice-Principals—Persons Having Control of Department.—A person who is clothed by a corporation with the control and management of a distinct department, in which his duty is that of direction and superintendence, is a vice-principal.

Same—Persons Giving Instruction to Inexperienced Employes.—Where a car-repairer has given notice to the company that he intends to leave its employment at a future date, and he is requested to give such instruction to his successor as he can to enable him to fulfill the duties of a car-repairer, and his successor is directed to work under his orders, such car-repairer is not the fellow-servant of his successor, but is vice-principal of the company.

REESE, C. J., dissents.

ERROR from District Court, Richardson County.

Marquett & Deweese for plaintiff in error.

Frank Martin for defendant in error.

MAXWELL, J.—This action was brought by the defendant in error in the district court of Richardson county, to recover damages for the death of James Sullivan, who was

Facts.

killed by the cars of the plaintiff in error, through the alleged negligence of the railway company. On the trial of the cause the jury returned a verdict in favor of the plaintiff below (defendant in error) for the sum of \$1,500, upon which judgment was rendered. It appears from the testimony that early in March, 1888, one James Sullivan entered into the employment of the plaintiff in error as a car-repairer at Falls City. It also appears that Sullivan was inexperienced in that business, and that he was placed by the master workman under the care of one McCarty, to learn his duties, as McCarty had given the company notice that he intended to quit on April 1st, and Sullivan was to take his place. The direct examination of McCarty is as follows: "*Question.* Do you remember the time of his [Sullivan's] death? *Answer.* Yes, sir. *Q.* Do you know the cause of his death? *A.* Yes, sir. *Q.* Tell the jury. *A.* Well, he was killed by the cars. He was crushed between two cars. *Q.* Whereabouts? *A.* On the east end of the stock track. *Q.* How many railroad tracks are there at the place you speak of? *A.* There are five or six; I don't just remember which. *Q.* Beginning at the south side of the railroad tracks, which one was it he was injured on? *A.* The second one. *Q.* The second one from the south? *A.* Yes, sir. *Q.* Tell the jury where he was, and what he was doing, when he was hurt. *A.* He was working between two cars. The cars were apart probably three feet on the east end of the stock track, and the train came in on the passenger track, and pulled up and set the cars in from the west end on the stock track. There were several spaces along on the track between the cars,—I don't remember just how many; and they struck them at that end, and run the cars down, and he was at work in between the cars, and it caught him right in across here somewhere, [witness indicates]. *Q.* Were you along in there between the cars when he was hurt? *A.* No, sir; I was standing up. *Q.* How far apart were the cars,—the one he was working at, and the one next him? *A.* About three feet. *Q.* What was his business? *A.* Car-repairer. *Q.* How long had he been engaged at that? *A.* 10, 12, or 14 days; I don't know just how long. *Q.* What was he required to do? *A.* He was required to do anything there was to do. *Q.* Was he the judge of what was to be done, or what was his situation? *A.* No, sir; he was under my orders as long as I was there. I intended to quit the first of the month, and the foreman told me to learn him all I could, so he could take my place. *Q.* Had he any experience on rail-

roads before that? *A.* Not to my knowledge. *Q.* When he was fixing the car where he was hurt, who had told him what to do,—who had put him there? *A.* I had told him. *Q.* Now what was the condition of the cars on that track west of where you were at work, so far as having brakes set? *A.* I think the first car west of us,—there were 5 or 6 west of us, and then a space of 5 or 6 feet; and I think the cars didn't have any of the brakes set, and I know the first car on the east end didn't have the brakes set, because I set the brakes myself. *Q.* When you and he went to work there, was there any connection between the track you were working on and any other track so a car could get in? *A.* No, sir; because the old main line was blocked. There was a train standing on it, as there wasn't room in the yard to put it on the side track. *Q.* What do you know about the cars being set in on that track that caused the other cars to move? *A.* They struck them at the west end with the engine. *Q.* How did they set them in? *A.* The train came from Atchison from the east, and pulled up over the Pacific track, and backed the train right in. *Q.* Did they have to open any tracks? *A.* Yes they had to open one switch. *Q.* How far was it from where you were at work? *A.* A half mile, I guess. *Q.* What do you know about them setting the cars in on that track. *A.* I don't know, only they struck the cars at that end, and the cars, not having the brakes set, run down the track, and struck the cars next us, and they didn't have the brakes on. *Q.* Do you know whether there was any one on the cars that were set in at that time to set the brakes or stop the cars? *A.* No, sir; I think not. When I got him out and laid him down by the cars, I ran up along the track, and I met a brakeman, but he was on the ground. *Q.* Which brakeman was it? *A.* I don't know which one. *Q.* Where did he come from? *A.* He was on that train. *Q.* A brakeman on the train that set the cars in on the track? *A.* Yes, sir; and he afterwards said he never would set cars in again without setting brakes. *Q.* How long was it after he was injured till he died? *A.* He got hurt somewhere between one and two o'clock, and he died the next morning between eight and nine, I believe. *Q.* Do you know about his condition before that,—whether he was a reasonably stout, hearty young man? *A.* He was, as far as I know, and I knew him for several years. *Q.* Had you been there with him all that night? *A.* Yes, sir. *Q.* What had he to do when you were there, in regard to any of the work, or anything to be done? *A.* He was to help do all the work that was to be done. *Q.* Under whose directions? *A.* The foreman's. *Q.* Who was the foreman? *A.* Culper was. *Q.* Was he there at night? *A.* No; he was under my charge at

night. Mr. Culper told him to do whatever I would tell him, because I was to quit at the end of the month, and he was to take my place."

In the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, the question as to a vice-

Vice-principals—Persons having control of department.

principal of a railway company was involved, and, in a carefully prepared and elaborate opinion, it was held, in effect, that one who was clothed by the corporation with the control and management of a distinct department, in which his duty is that of direction and superintendence, is a vice-principal.

Justice FIELD, in his opinion in that case, said: "There is, in our judgment, a clear distinction to be made in their relation to their common principal between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him, in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles, at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start; at what speed it shall run; at what stations it shall stop, and for what length of time, and everything essential to its successful movements; and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow-servant with the fireman, the brakeman, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction, who, as to them and the train, stands in the place of, and represents, the corporation. As observed by Mr. Wharton, in

his valuable treatise on the Law of Negligence: 'It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But, if this be true, it would relieve corporations from all liability to servants. The true view is that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation. Section 232a.'"

The above case is reported in 17 Am. & Eng. R. Cas. 501, and in a note it is said: "No rule has yet been laid down which can be applied with entirely satisfactory results. Whether or not a foreman or superintendent has the power to employ and discharge those acting under him has been in some cases proposed as the crucial test of whether he is a vice-principal or not." *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Kansas Pac. R. Co. v. Little*, 19 Kan. 267; *Stoddard v. St. Louis, etc., R. Co.*, 65 Mo. 514; *Hofnagle v. New York Cent. & H. R. R. Co.*, 55 N. Y. 608; *Cook v. Hannibal, etc., R. Co.*, 63 Mo. 397; *Huntingdon & B. T. Mt. R. & C. Co. v. Decker*, 82 Pa. St. 119; *Railroad Co. v. State*, 44 Md. 283; *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83; *Chicago & A. R. Co. v. May (Ill.)*, 15 Am. & Eng. R. Cas. 320. But this test is unsatisfactory. It is, we believe, true that in every case where the power to employ and discharge exists, the relation established has been held to be, not that of a fellow-servant, but of vice-principal. The correlative of this proposition does not, however, obtain. There are cases where the right to employ and discharge is absent, in which, notwithstanding, the relation of vice-principal has been held to be established, and liability has been imposed upon the company accordingly. It is in some cases held that servants, who are engaged in entirely different branches of railroad employment, are not to be regarded as fellow-servants, within the meaning of the law. Accordingly some authorities are to the effect that a company is liable for injuries to train hands, occasioned by the negligence of a repair-man upon the track, and *vice versa*. *Railroad Co. v. Jones*, 9 Heisk. (Tenn.), 27; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171; *Pittsburgh, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341; *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill. 391; *Dick v. Indianapolis, C. & L. R. Co. (Ohio)*, 8 Am. & Eng. R. Cas. 101.

The cases relating to the subject of vice-principal and fellow-servant are involved in great conflict and confusion, and it is impossible to harmonize them. Some of these cases seem to make distinctions without an essential difference in the facts. The subject is very fully discussed in 7 Am. & Eng.

Encyc. of Law, 838-844; and the general rule to be deduced from the later decisions is that it is not the rank of the employe, but the nature of the duty with which he is clothed, that is decisive, and in our view the classification made by the supreme court of the United States is correct, and in consonance with our own decisions. The above testimony of McCarty, therefore, if true, (and that is a question for the jury,) is sufficient to constitute him a vice-principal as to Sullivan, under the rule stated by this court in Chicago, St. P., M. & O. R. Co. v. Lundstrom, 16 Neb. 254, 21 Am. & Eng. R. Cas. 528; Sioux City & P. R. Co. v. Smith, 22 Neb. 780; Burlington & M. R. Co. v. Crockett, 19 Neb. 145, 24 Am. & Eng. R. Cas. 390.

The court, however, at the request of the attorney for the defendant in error, gave the following instruction: "The jury are instructed that if they believe from the evidence that the deceased, James Sullivan, came to his death through the wrongful act, default, or negligence of defendant, or its servants or employes, and not through his own wrongful act or negligence, then they will find for plaintiff, and assess her damages at such sum as they believe from the evidence she should recover, not exceeding the sum claimed in her petition." This was duly excepted to, and is now assigned for error.

It will be observed, that the instruction is entirely too broad and general in its terms, and fails to distinguish the acts of a vice-principal from those of a fellow-servant, and was well calculated to mislead the jury, and fails to state the law correctly. The other questions in the case are questions of fact, upon which, to some extent, there is a conflict of testimony, and, as there must be a new trial, they will not be discussed. The judgment of the district court is reversed and the cause remanded for further proceedings.

REESE, C. J., (*dissenting*).—I do not agree to the conclusion reached by my associates, that the giving of the instruction quoted in the opinion of the majority was necessarily prejudicial error, and will briefly state my reasons for such dissent. I think it is true that the instruction, if taken alone, and without qualification, would be insufficient, as not fully stating the rule of negligence as applicable to cases of this kind. It must be conceded that the negligence of the "servants and employes" of the defendant would be its own negligence, for it acts only through its servants and employes. It can act in no other way. In addition to the instruction above referred to, the court, upon the request of defendant in error, gave instruction number 4 and

Sufficiency of
Instructions.

Instructions
—Error.

instruction number 2, given upon its own motion, both of which we here copy: "(4) You are instructed that the negligence of the defendant that would make it liable must be the negligence of the company itself, or some superior agent who stood in place of the company, as between it and the deceased, Sullivan. And if you find that a car repairer, as a fellow laborer, working with Sullivan, who had more experience, and on that account was showing Sullivan how to do the work, was negligent, and this negligence caused or contributed to the injury, the defendant would not be liable. (2) The law of negligence, as applied to this case, is given, in the instruction given at the request of the parties, to such an extent that but little need be added. The defendant railroad company is liable for the negligence of its servants, superior in employment to the deceased at the time of his death, if the negligence of such superior servant caused the injury complained of, and there was no contributory negligence on the part of deceased. But the defendant would not be liable for negligence of a fellow-servant of deceased. A fellow-servant, within the meaning of this proposition, means an associate employe with the deceased, in the same line of employment with the deceased, and without authority over the deceased more than the deceased had over such fellow-servant in the work in which deceased was engaged at the time of the injury. The authority of a fellow-servant to instruct another fellow-servant, less experienced as to the duties and dangers of the employment, of itself does not prevent their being fellow-servants, within the meaning of the rule of law above mentioned."

It is a well established rule of law, and one which has been repeatedly recognized in this state, that the whole of the instructions given to a trial jury must be considered together, and if none of them mistake the law as applicable to the case on trial, and they are susceptible of being harmonized when so considered, they could not mislead the jury, and a new trial will not be granted. Stated differently, if an instruction only partially states the rule to be applied, it will not be held to constitute reversible error, if the rule is fully and correctly stated in another portion of the charge, and the whole instruction, when thus considered together, presents a correct and consistent statement of the law. *Parish v. State*, 14 Neb. 67; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 584, 18 Am. & Eng. R. Cas. 68; *Gray v. Farmer*, 19 Neb. 71. Applying this well recognized rule to this case, I can see no difficulty growing out of the instructions. The first one instructed the jury that if they found that the injury was caused by the negligence of defendant, its servants or employes, and not by that of the deceased, the plaintiff in the action should recover;

and by the others they were informed what servants and employes were referred to, and that all others should be excluded. I think this could work no prejudice.

Fellow-Servants—Negligence of Instructor Furnished by Employer.—Certain storekeepers ordered the porter in their store to run an elevator, and as he had never run one before, furnished an instructor to teach him how to do so. *Held*, that the instructor was not a fellow-servant of the porter, but was the representative of the master, and that the storekeepers were liable to the porter for injuries sustained in the use of the elevator through the incompetency or negligence of the instructor. *Brennan v. Gordon*, 13 Daly (N. Y.), 208.

LOUISVILLE & NASHVILLE R. CO.

v.

SHEETS.

(*Kentucky Court of Appeals, March 13, 1890.*)

Fellow-Servants—Locomotive Engineer and Yard Switchman.—A locomotive engineer is not the fellow-servant of a yard switchman, and the employer is responsible for injuries caused to the latter by the negligence of the former.

• **APPEAL** from Court of Common Pleas, Franklin County.
Ira Julian for appellant.

Thos. H. Hines, A. Duvall and Scott & Violett for appellee.

PRYOR, J.—The appellee, Lee Sheets, instituted this action below to recover for a personal injury resulting in the loss of one of his hands, caused, as is alleged, by the negligence of the employes of the appellant in charge of its engine. The appellee had been in the employ of the appellant, the Louisville & Nashville Railroad Company, for a number of years, engaged at its switch yard in Frankfort, in switching and shifting cars. George Wilder was the yard-master, Ed. Grant the engineer, and Sanders the fireman. Cars was standing on the side track, and the appellee, who was the switchman, was ordered by the yard-master to couple the cars, so as to bring them out. The ground of recovery was that the engineer, although signaled, failed to check the speed of the engine, but moved up with such rapidity and force as to catch the hand of the appellee between the bumpers before he had time to finish the coupling and leave the cars. There was evidence conducing to show that the engineer failed to reverse the engine, and also to show that the engine

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was moving faster than was usual in such cases. While the engineer testifies that he did reverse the engine, and there is testimony showing that the engine was moving at the usual speed, the testimony for the plaintiff shows a different state of facts, and it was with the jury, and not with this court, to determine the effect and weight of the testimony. John Loyd, another switchman, says that the engine was not reversed, and was moving at the rate of three or four miles an hour, and that from one to one and a half miles an hour was fast enough. Sanders says that he saw the signal, and repeated it to the engineer, and they were moving up slowly at the time; that the signal was not given until they were almost a car length from the still cars. The engineer states that he did not see Sheets when he went in to couple the cars, or when he was injured, and was obeying signals from the fireman, and did not check the engine until it was very close to the still cars. The appellee had been ordered to couple the cars. The yard-master, engineer, and fireman were present for that purpose; and that the sudden and rapid movement of the train or engine against the still cars caused the injury is a fact believed by the jury, and upon which they based their verdict. We cannot disturb the finding on the facts.

The engineer is required to have superior skill in his employment to that of the mere brakeman or switchman, who may be a common laborer, and still suited to the employment; as it requires but little, if any, skill to discharge such a duty. The yard-master and engineer would be both responsible for the movements of the train in many instances, and each is superior to the brakeman, and to such an extent as to make the company responsible for the injury to the brakeman caused by the gross neglect of either the one or the other. The cases of *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.), 114; *Same v. Robinson*, 4 Bush. (Ky.), 507; *Same v. Filbern*, 6 Bush. (Ky.), 574; *Same v. Moore*, 83 Ky. 675, 24 Am. & Eng. R. Cas. 443, are decisive of the right of recovery by the switchman, where the injury results from the neglect of the engineer or conductor.

The instruction given by the court below, defining "gross negligence," is taken from the opinion of this court in the case of *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403, 15 Am. & Eng. R. Cas. 277, and, if not a correct definition, was more favorable to the defendant than to the plaintiff. The jury was told that it is the failure to exercise such skill as one of careful habits would observe, to avoid danger, under similar circumstances. Gross neglect is the absence of ordinary care, and if the jury believed the

Engineer and
switchman
not fellow-
servants.

Instructions
—Gross negli-
gence.

testimony of the appellant's witnesses in this case, and this they seem to have done, the verdict was proper. There was no instruction asked by the defense on the question of contributory neglect, and for the reason that no such neglect appears. The jury was told that "the plaintiff accepted the employment, assuming all the risks usually incident to the discharge of his duties; that the railroad was not an insurer of plaintiff against accidents or injuries suffered by reason of the hazardous nature of his duties in the ordinary course of his employment." This instruction covered the entire ground of the defense, and the jury could not have failed to understand its meaning.

While the verdict is for a considerable sum, we are not disposed to adjudge that the loss of a hand, under such circumstances, is more than compensated by such a verdict. Numerous affidavits were filed for a new trial, all of which were deemed insufficient by the court below, and in this we concur. The only question for the defense in this case arises from the fact of the appellee being an employe in the same service with the engineer, and, while counsel has referred us to many authorities outside of the state sustaining such a character of defense, the point is now so well settled by this court as scarcely to admit of discussion. Judgment affirmed.

Fellow-Servants—Engineers and Switchmen.—The greater number of the courts have held that the engineer of a locomotive and a switchman are fellow-servants, and that the company is not responsible for injuries to the latter caused by the negligence of the former. *Naylor v. New York C. & H. R. R. Co.*, 33 Fed. Rep. 801; *Smith v. Memphis & L. R. Co.*, 18 Fed. Rep. 304; *Randall v. Baltimore & O. R. Co.* (U. S.), 15 Am. & Eng. R. Cas. 243; *Brown v. Central Pac. R. Co.*, 68 Cal. 171; *Columbus, C. & I. R. Co. v. Troesch*, 68 Ill. 545; *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 222; *Satterly v. Morgan*, 35 La. Ann. 1166; *Farwell v. Boston & W. R. Co.*, 4 Met. (Mass.), 49, 38 Am. Dec. 339; *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea (Tenn.), 46, 17 Am. & Eng. R. Cas. 568; *Fowler v. Chicago & N. W. R. Co.*, 61 Wis. 159, 17 Am. & Eng. R. Cas. 536. But when an engineer employed by a company owning and running trains is injured by the negligence of a switchman employed by a different company which owns and leases the road, the engineer is not a fellow-servant of such switchman. *Smith v. New York & H. R. Co.*, 19 N. Y. 127, 75 Am. Dec. 305.

The courts of Tennessee and Kentucky, however, regard the engineer as the superior servant of brakemen, switchmen, etc., and hold the company responsible for injuries caused to them through his negligence. *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129; *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227; *Nashville, C. & St. L. R. Co. v. Wheless*, 10 Lea (Tenn.), 741, 15 Am. & Eng. R. Cas. 315. See, also, *Cowles v. Richmond & D. R. Co.* (N. Car.), 2 Am. & Eng. R. Cas. 90.

HOWARD

v.

DELAWARE & HUDSON CANAL CO.

(U. S. Circuit Court, D. Vermont, October 26, 1889.)

Injuries to Employees—Trackman—Failure of Train Hands to Keep Look-out.—Plaintiff's intestate, a trackman, was killed while operating a hand-car. The section boss had sent a signal flag by one of the trackmen to meet an approaching train. The train hands, having failed to keep a look-out, ran into the hand-car before the trackmen could get out of the way, and intestate was killed. *Held*, that the death of the intestate was caused by the negligence of those in charge of the train.

Fellow-Servants—Train Hands and Trackmen.—Persons in charge of and operating trains are not fellow-servants of trackmen, and the latter are entitled to recover for injuries sustained through the negligence of the former.

Wrongful Death—Damages—Action for Benefit of Collateral Kindred.—Under a statute which provides that, when the death of a person is caused by a wrongful act, which would, if death had not ensued, have entitled the injured person to maintain an action therefor, the person or corporation causing the injury shall be liable to an action in the name of the personal representative for the benefit of the wife and next of kin, and such damages may be given as are just with reference to the pecuniary injury resulting from such death to them, when the deceased was, at the time of his death, past middle age and had accumulated no means, only nominal damages can be recovered, in an action for the benefit of collateral kindred whom the deceased was under no obligation to support.

Same—Pleading—Rights of Distributees.—When an action is brought by the personal representative to recover damages for the death of his intestate for the benefit of the deceased's next of kin, the declaration is sufficient if it sets forth the right of the plaintiff to recover without alleging specifically the rights of the respective distributees.

ACTION at law to recover damages for negligently causing the death of plaintiff's intestate.

David E. Nicholson and *Joel C. Baker* for plaintiff.

John Prout and *Henry Ballard* for defendant.

WHEELER, J.—Clary, the plaintiff's intestate, was about thirty-seven years old; had three brothers and two sisters, no wife, children, or parents; and had accumulated no property. He was employed as a trackman by a section boss of the defendant's road; and, with four others, under direction of the boss, was running a hand-car over a part of their section towards a train coming from the other way, to which the boss had sent their signal flag by one of the trackmen, to warn those in charge of the train of the approach of the hand-car. Neither the engineer nor any one

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in charge of or on the train was keeping any lookout ahead as it approached the hand-car, and no one on the train saw it till within two or three rods of it. The trackmen supposed the train would slow up as it approached them, in obedience to the warning, and came so near it before stopping to take the hand-car from the track that the boss saw it would be struck by the train before they could get it off, and told the men to run it the other way. They tried to do so, but could not move it fast enough to get away from the train, and he directed them to abandon it. In jumping from it, Clary was thrown under it, the engine struck it, and he was instantly killed.

The statutes of the state provide that when the death of a person is caused by such wrongful act, neglect, or default as would, if death had not ensued, have entitled the party injured to maintain an action therefor, the person or corporation that would have been liable if death had not ensued, shall be liable to an action in the name of the personal representative for the benefit of the wife and next of kin, and that such damages may be given as are just, with reference to the pecuniary injury resulting from such death to them. R. L. Vt. §§ 2138, 2139. This action is brought upon this statute, for the benefit of the brothers and sisters, as next of kin, and has been tried by the court upon waiver in writing of a trial by jury.

The defendant claims that Clary was negligent in remaining so long upon the car, and in jumping from it, and thereby contributed to the injury; that the collision was caused by the negligence of the flagman, a fellow-servant with Clary, in giving wrong information to the trainmen about where the hand-car would be met; and that, if it was caused by negligence of the trainmen, all were so fellow-workmen with Clary that the defendant is not liable to his representative for it. Clary could see the train coming, and could have got out of its way; but, with the others, he relied upon due respect of the trainmen to the flag, and to the directions of the boss, for safety; and, in view of what he had a right to rely upon in those respects, he does not appear to have been negligent of duty to himself or others in staying at his place on the car as he did. He was moving backwards with the car, working it, with the others, to his utmost strength, when directed to abandon it; and appears to have been thrown before it by a misstep, caused by haste in turning and jumping, made necessary by the nearness of the train, and ledges of rock which prevented jumping off from the side of the car on which he was. Natural instinct would impel him to do what he could to save himself, and nothing shows that he did not obey it.

The testimony is conflicting as to what the man who carried the flag told those in charge of the train about where the trackmen and hand-car would be. Whatever that was, the flag of the sectionmen itself was a warning that they were on the track somewhere near, and were to be approached with caution; and it would be in force from the time when the flag was observed until they should be passed. To run the train towards them, after that warning, without keeping any lookout ahead for them, was a neglect of duty required for their safety as well as for that of the train. This negligence appears to have caused the collision, and the injury to Clary, without any contributing neglect of duty on his part. If the flagman contributed to the happening of the collision by giving wrong information, it would not have happened but for the negligence of those in charge of the train; and whoever is chargeable for that is liable for its consequences to Clary. *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.), 90.

Negligence of
train hands.

The question of law whether the defendant is liable to its trackmen for injuries done to them by negligence of those in charge of its trains is presented by these facts. If this question was to be determined by the decisions of the court of last resort of the state, that in *Davis v. Central Vermont R. Co.* appears to be the latest and most apt. 55 Vt. 84, 11 Am. & Eng. R. Cas. 173. It appears to hold, in effect, that a railroad company in the state is liable to its trainmen for the negligence of those it has placed in charge of its tracks. It overrules, in view of intervening decisions of other courts, *Hard v. Vermont, etc., R. Co.* 32 Vt. 473, which classed all persons employed in maintaining the track and machinery of railroads and operating their trains as fellow-servants, for injuries to whom by negligence of each other the companies were not liable. If the company is responsible to trainmen for the negligence of those in charge of the track, that it should be held responsible to trackmen for the negligence of those in charge of its trains would seem to directly follow. But the courts of the United States are not bound by the decisions of the courts of the states upon questions of general law like this, although they are entitled to and receive the highest respect. *Boyce v. Tabb*, 18 Wall. (U. S.), 546; *Chicago v. Robbins*, 2 Black (U. S.), 418. This court is, however, in duty bound to follow the decisions of the supreme court of the United States upon all such questions. That court has held that a railroad company is liable to its trainmen of one train for the negligence of those whom it has placed in charge of another train, and of the same train.

Trackmen
and train
hands not fel-
low-servants.

Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501. This decision appears to have been made by a bare majority of the court, but it stands unreversed and unshaken, and is equally binding here with those that are unanimous. Trackmen are no more co-laborers with trainmen than the trainmen of one train are with those of another train on the same road, and not so much so as trainmen of the same train are. Those in charge of this train were placed there, and clothed with that authority, by the defendant. They acted for the defendant in the exercise of the control given them over the movements of the train: and their negligence in that behalf appears, according to this decision of the supreme court of the United States, to be the negligence of the defendant. The principles of this decision lead to the same conclusion as those of the latest decision on this subject of the highest court of the state, as cited. In *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243, a brakeman of one train appears to have been held to be so the fellow-servant of the engineer of another train of the same company as not to be entitled to recover of the company for injuries occasioned by his negligence. That engineer does not appear to have been clothed with any of the authority of the company about the moving of the engine or train; and in that respect it differs from the later case. In the case under consideration the flag was brought to the notice of the conductor, who had control of the train as to where it should undertake to pass the hand-car. In this respect it is like the later case, rather than the former. Upon all of these cases Clary would have been entitled to recover damages of the defendant if he had not been killed, and by force of the statute the plaintiff appears to be entitled to recover now. As the plaintiff is entitled to recover, he is entitled to nominal damages at least, and to such further sum as is proved within the meaning of the statute.

No case has been cited or observed from the courts of the state in which the right of recovery, or measure of damages, in actions upon this statute for the benefit of collateral kindred has been considered. In *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.), 96, the action was upon a statute of Illinois, almost like this in words, and precisely in meaning, as to giving a right of recovery to the wife and next of kin, and authorizing such damages as are just with reference to the pecuniary injury resulting from such death to them, and was for the benefit of brothers and sisters. The defendant there, as here, asked the circuit court to hold that no recovery could be had for the benefit of any but those who had a legal

Measure of
damages—
Collateral
kindred.

right to support from the deceased. The court ruled that the action was given for the benefit of those named in the statute, whether they had such right to support or not; and instructed the jury that they could not take into consideration the wounded feelings of the surviving relatives, but might the amount of property of the deceased, the character of his business, and the prospective increase in wealth likely to accrue to a man of his age, with the business and means which he had. These rulings were approved, and Mr. Justice Nelson, in the opinion of the supreme court said: "If the deceased had lived they may not have been benefited, and, if not, then no pecuniary injury could have resulted to them from his death. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law on his death, if intestate, would have passed to his wife and next of kin. In case of his death by the injury, the equivalent is given by a suit in the name of his representative." This shows that the pecuniary injury resulting from the death is the loss of what the deceased would probably have accumulated afterwards if he had lived. In this case the deceased had accumulated nothing for any one up to the time of his death in middle life. He was no more likely to accumulate property from then forward than before. The deprivation of his society, affection, or counsel is not to be considered. The actual probable pecuniary loss is all that the statute covers and can be allowed for. Upon the evidence, considering all the probabilities of his future, no just ground for finding that he would ever accumulated any property for his brothers and sisters is apparent.

Question is made as to the sufficiency of the allegations of the declaration for supporting a recovery for the benefit of the brothers and sisters. If the action was given directly to those suffering the injury, the declaration would need to set forth the facts constituting the right of recovery of those who should bring suit. But the action is given to the personal representative; and the right is the same for whosever benefit the suit may be brought. The recovery is to go to the widow and next of kin, as the personal estate would, exclusive of creditors and legatees. *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.), 96. The questions as to who are beneficiaries are left until distribution. A declaration which sets forth adequately the right of the personal representative to recover, would seem to be sufficient, without alleging specifically the rights of the respective distributees. Let judgment be entered for the plaintiff for one dollar damages.

Sufficiency of
declaration.

Trackmen are Fellow-Servants of Train Hands Where the Negligence of the Latter Causes Injury to the Former.—The decision in the principal case

is wrong. The error of the court is clearly apparent, for the decision is not only in conflict with a long and almost unbroken series of authorities holding that trackmen injured through the negligence of train hands are the co-servants of the latter, but it has not the least foundation in principle.

The cases are numerous as well as unanimous. In each of the following cases the employe injured was a servant employed about the company's track as section hand, repairer, walker, etc., while the offending employe whose negligence caused the injury was employed on or about the company's trains. And in every instance the court held that the two employes stood in the relation of fellow-servants. *Collins v. St. Paul & S. C. R. Co.*, 30 Minn. 31, 8 Am. & Eng. R. Cas. 150; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395, 15 Am. & Eng. R. Cas. 187; *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297; *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31, 5 Am. & Eng. R. Cas. 581; *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 Mo. App. 621; *Schultz v. Chicago & N. W. R. Co.*, 67 Wis. 616, 58 Am. Rep. 881, 28 Am. & Eng. R. Cas. 404; *Clifford v. Old Colony R. Co.*, 141 Mass. 564; *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267; *O'Connell v. Baltimore & O. R. Co.*, 20 Md. 212, 83 Am. Dec. 549; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Baltimore & O. R. Co. v. State*, 41 Md. 227; *Van Winkle v. Manhattan R. Co.*, 32 Fed. Rep. 278; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Whaalan v. Mad River L. E. R. Co.*, 8 Ohio St. 249; *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492; *St. Louis, I. M. & S. R. Co. v. Shackelford*, 42 Ark. 417; *Sullivan v. Mississippi & M. R. Co.*, 11 Iowa 421; *Connolly v. Minneapolis E. R. Co.*, 38 Minn. 80; *East Tennessee, V. & G. R. Co. v. Rush*, 15 Lea (Tenn.), 145, 25 Am. & Eng. R. Cas. 502. Compare *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill. 391; *Chicago & A. R. Co. v. Kelley* (Ill. 1889.), 21 N. E. Rep. 203. Such a decided unanimity of opinion by so many different courts is certainly an argument worthy of consideration, yet Judge WHEELER, in the principal case silently ignores them.

The substance of the court's argument is found in the sentence, "If the company is responsible to trainmen for the negligence of those in charge of the track, that it should be held responsible to trackmen for the negligence of those in charge of its trains would seem to directly follow." With all due respect to the eminent and learned judge, we beg to say that it does not follow at all, and this for reasons perfectly sound. A railroad company is held responsible for injuries to trainmen caused by the negligence of track hands in failing to keep the track and roadbed in a suitable condition for the reason that the law implies a contract on the part of the master to provide the servant with machinery and appliances adequately safe for use. The track and roadbed of a railroad are among such appliances. Therefore, when the company delegates the duty of seeing that these are kept in safe and suitable condition to section men, track walkers, etc., they become the representatives of the company, its vice-principals. *McKinney on Fellow-Servants*, § 29, 139. But this rule has not the least application when the conditions are reversed. The employes running the train do not exercise any of the personal functions of the master, and they have delegated to them none of the duties which the company contracts with its servants to perform with reasonable care. The engineer's duty to keep a lookout, to run at a proper rate of speed, and to give proper signals so as to avoid injuring track hands is not different in its character from any of the ordinary duties imposed upon railroad servants. If the company is held liable for their negligent performance, the fellow-servant rule is nullified.

But the court pins its faith to the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501. That decision has been

made to do duty ever since it was decided in the way of supporting fallacious arguments on this question of co-service. It is not surprising then that the court in the present instance attempts to find some support in it. The only point decided in the "Ross Case" was, that the negligence of the conductor of a railway train, is, as regards other train hands, the negligence of the company. FIELD, J., in his opinion especially limited the decision to this narrow point. The deduction from this case of what he considers support is accomplished by Judge WHEELER, in these words: "Trackmen are no more co-laborers with trainmen than the trainmen of one train are with those of another train on the same road, and not so much so as trainmen of the same train are. Those in charge of this train were placed there, and clothed with that authority, by the defendant. They acted for the defendant in the exercise of the control given them over the movements of the train; and their negligence in that behalf appears, according to this decision of the supreme court of the United States, to be the negligence of the defendant." No one questions the assertion that the trainmen control the movements of the train and that they are placed on the train for that purpose. But does the eminent judge intend to assert as a principle of law that any employe who controls the operation of any machinery or appliance which the master places in his hands, is a vice-principal as regards any other employe who may be injured by his negligence? If the principle applies to train hands it applies to all other employes controlling appliances of the master. As an illustration, if, in the shops of a railroad company, a servant employed at an anvil should negligently strike a co-laborer with his hammer, they could not be considered fellow-servants under the common-law rule, for the wielder of that hammer was "placed" at that anvil, and "clothed with authority" to swing his hammer by the company. He acts for the company "in the exercise of the control given him over the movements of the" hammer, and "his negligence in that behalf" would equally appear, under this argument, "according to the supreme court of the United States, to be the negligence of the" company. But, in truth, the decision of the national supreme court, however erroneous it may be, was never intended to sanction any such absurd doctrine. It does not furnish the least support for the decision in the principal case, which must be ranked as another of those efforts to soften the so-called rigor of the law at the expense of an accurate judgment.

PENNSYLVANIA R. CO.

v.

O'SHAUGHNESSY.

(*Indiana Supreme Court, January 31, 1890.*)

Contributory Negligence—Pleading—General and Particular Averments.—

A complaint averred that the intestate was directed to assist in making up a train in defendant's yard: that as part of his duty he was proceeding carefully and diligently along the track to a switch to which it was his duty to go; that an incompetent employe in charge of the train caused it to be run at a speed of 40 miles an hour without giving any signals or warning, and that intestate was run over and killed. It also contained a gen-

eral averment that there was no fault or negligence whatever on the part of the intestate. *Held*, that the allegations of the complaint did not show contributory negligence on the part of the intestate so as to break the force of the general averment that he exercised due care.

Same—Switching—Walking upon Track Unnecessarily.—A brakeman engaged in switching, who unnecessarily walks upon the track and who gives no heed to the approach of a train which he knows must follow him, is guilty of contributory negligence which precludes a recovery for his death.

APPEAL from Superior Court, Allen County.

Brackenridge & Carey for appellant.

Bell & Morris and *L. M. Ninde* for appellee.

ELLIOTT, J.—The appellee seeks a recovery against the appellant for wrongfully causing the death of his intestate, Albert O'Shaughnessy. It is unnecessary to do more than outline the allegations of the complaint respecting the negligence of the appellant, as the single objection urged against it is that it shows that the intestate was guilty of such contributory negligence as bars a recovery. Shortly stated, the

**Allegations
of complaint.**

allegations of the complaint concerning the negligence of the appellant are that it knowingly employed, and knowingly kept in its employ, an incompetent employe; that this incompetent employe negligently ran a train upon the intestate while he was engaged in the line of his duty as a brakeman; that this incompetent employe ran the train in disregard of the established rules of the company, and in a mode, and at a rate of speed, forbidden by the ordinances of the city of Fort Wayne. The specific allegations of the complaint, in so far as they bear upon the question of contributory negligence, are in substance these: The intestate was directed by his superior to assist in making up a train in the appellant's yard. Pursuant to this order, and as a part of his duty, he was proceeding carefully and diligently along the track to a switch to which it was his duty to go. The incompetent employe in charge of the train caused it to be run at the speed of 40 miles an hour, and gave no signals or warnings of any kind. The intestate, while passing along the track to the switch to which he was directed to go, was run over by the train, and killed.

The complaint contains the general averment that there was no fault or negligence whatever on the part of the intestate. As the complaint contains the general aver-

**Contributory
negligence—
Pleading.**

ment that the intestate was without contributory fault, it is sufficiently strong to repel the attack made upon it unless the specific allegations clearly show that the intestate was guilty of contributory negligence. It has long been the rule in this court that the general aver-

ment makes the complaint good unless its force is clearly broken by the specific allegations of the pleading. *Ohio & M. R. Co. v. Walker*, 113 Ind. 196, 32 Am. & Eng. R. Cas. 121, and cases cited; *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446; *Louisville, N. A. & C. R. Co. v. Sanford*, 117 Ind. 265. The specific averments in the complaint before us do not overthrow the general averment that the intestate was without fault. These specific allegations do not establish the fact, as counsel assume, that he was wrongfully on the track. So far are they from doing this that they in truth strongly fortify the general averment, by showing that he was where it was his duty to be, and where he was ordered to be by those placed over him by the master. An employe who does what he is ordered to do is not at fault, but is protected, to a reasonable extent, by the order, while engaged in performing the special duty enjoined upon him. *Taylor v. Evansville & T. H. R. Co.*, *ante*, p. 437, (Nov. 21, 1889;) *Cincinnati, I., St. L. & C. R. Co. v. Lang*, 118 Ind. 579, 38 Am. & Eng. R. Cas. 25; *Coombs v. Cordage Co.*, 102 Mass. 572; *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass. 461; *Haley v. Case*, 142 Mass. 316; *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Iowa, 658, 18 Am. & Eng. R. Cas. 56; *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581; *Reagan v. St. Louis, K., etc. R. Co.*, 93 Mo. 348; *Lewis v. Seifert*, 116 Pa. St. 628. But, if the intestate had not been acting under a special order, he was nevertheless entitled to assume that ordinary care would be exercised for his safety; for he was, as the complaint shows, where his general duty required him to be, and of this the master was bound to have knowledge; and this knowledge imposed upon it the general obligation to exercise reasonable care to prevent his exposure to extraordinary peril. *Cincinnati, I., St. L. & C. R. Co. v. Long*, 112 Ind. 166, 31 Am. & Eng. R. Cas. 138; *Goodfellow v. Boston, H. & E. R. Co.* 106 Mass. 461; *Quirk v. Holt*, 99 Mass. 164; *Mark v. St. Paul, M. & M. R. Co.*, 33 Minn. 208. It is, of course, incumbent upon an employe, whether acting under orders or not, engaged in the line of his duty, to use ordinary care to avoid injury; but he is not to be deemed negligent while so acting from the mere fact that he remains upon the track, or passes along it. It is sufficiently evident from what we have said that the intestate was not a trespasser, and that such cases as *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, and *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St. 366, are wholly irrelevant to the point in issue. To give force to those decisions, the facts must be such as to show that the railroad company was not under any duty to the person injured by the negligence of its employes. This cannot be true of an employe

engaged in the line of his duty, and acting under a special order from his superior.

The answers of the jury to the special interrogatories propounded to them by the plaintiff show that the intestate was in the appellant's service as a brakeman at the time he was killed; that he was ordered to open a switch to let the train out of the yard; that he obeyed the order; that at the time he was struck by the engine he was endeavoring to get out the way of the train; that the train was run at a speed of from 18 to 30 miles an hour; that no signals or warnings were given; that if it had been run at a less rate of speed the intestate would have escaped injury; that the engineer in charge had injured other employes by his recklessness, and that his reputation was that of a careless and reckless engineer; that the company's officers might have acquired knowledge of his reputation by the exercise of ordinary diligence. The answers to the interrogatories propounded by the defendant state, in substance, these facts: The intestate was struck while walking westward on the track. The engine which struck him was backing. There was an open space of eight feet between the track on which the intestate was walking and the track running parallel with it. He had been in the service of the company for four years before his injury. The intestate got off the engine, when directed to throw the switch, on the space between the tracks, and then stepped back on the track. The space between the tracks was clear and unobstructed. This space was prepared and maintained for the purpose of providing a safe path for the employes of the company. The intestate did not look eastward, to see whether the train was approaching, after he stepped upon the track upon which the train was moving. He could have seen the train, had he looked, and he had walked along the track about 60 feet before he was struck.

We are strongly inclined to the opinion that the appellant was entitled to judgment on the facts stated in the special answers of the jury; but, as the evidence makes the case much stronger in the appellant's favor, we will place our decision upon that, and not upon the answers of the jury. The evidence clearly shows that the intestate was unnecessarily walking upon the track, and that he gave no heed to the approach of the train which he knew must follow him. If the intestate had gone upon the track because his duty required him to go there, or because he could not perform his duty without walking along it, the action might perhaps be maintained; but it was not necessary for him to walk upon

Findings of jury.

Contributory negligence—Walking on track unnecessarily.

the track, for he could with equal convenience have walked along the space between the tracks which the company had set apart for the use of its employees. Two ways of going to the switch were open to him,—one entirely safe, the other very perilous; and he voluntarily chose the perilous one. He left the safe way after having gone upon it, and took the dangerous one; and, although he knew the danger to which he exposed himself, he took no precautions to avert it. While walking along the track, he was not engaged in a duty which required and absorbed his whole attention, so that the case cannot be brought within the rule that absolves an employee who is engrossed in duty on the track from the exercise of a high degree of care. It was the duty of the intestate to use due care to avoid injury, and to constitute due care it is essential that the precaution exercised should be proportionate to the danger which the person upon whom this duty rests knows that he incurs. *Cincinnati, I., St. L. & C. R. Co. v. Long*, 112 Ind. 166, 31 Am. & Eng. R. Cas. 138; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 31 Am. & Eng. R. Cas. 216; *Bresnahan v. Michigan Cent. R. Co.*, 49 Mich. 410. An element is here present which is conspicuous and important, and that is this: The intestate had been in the service of the company for four years, and was familiar with the mode of making up trains. He was bound to act upon the knowledge thus acquired, and to act with prudence and care, to avoid the peril which this knowledge informed him he was exposed to in making up the trains in the company's yard. The authorities go very far upon this subject, for they hold that where an employee has knowledge of danger, and remains in the service, he assumes the increased risk. *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 33 Am. & Eng. R. Cas. 334; *Louisville, N. A. & C. R. Co. v. Sanford*, 117 Ind. 265, and cases cited; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. St. 301, 33 Am. & Eng. R. Cas. 348; *New York, L. E. & N. R. Co. v. Lyons*, 119 Pa. St. 324; *Wilson v. Winona & St. P. R. Co.*, 37 Minn. 326, 31 Am. & Eng. R. Cas. 244; *Gaffney v. New York & N. E. R. Co.*, 15 R. I. 456, 31 Am. & Eng. R. Cas. 265. But we need not carry these decisions to their logical result in this instance; for it is enough to adjudge that there can be no recovery, for the reason that there was a lack of care on the part of the intestate which proximately contributed to his injury. We do not, therefore, do more than decide that there was such contributory negligence as bars a recovery, thus leaving other questions undecided. Judgment reversed, with instructions to award a new trial.

Pleading—Alleging Specific Acts of Negligence.—A petition in an action

to recover damages for negligently causing the death of plaintiff's intestate, set out the circumstances as a matter of inducement to the extent of stating the names of the conductor and engineer in charge of the train. It stated that the deceased was run over and killed by a designated train, and that his death was occasioned by the negligence of the defendants' servants while running, conducting and managing the locomotive and train of cars. *Held*, that as the petition was sufficient on demurrer, it was not open to an objection made by way of an objection to the introduction of evidence, that it did not state any specific act of negligence. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113.

Same—Instructions—Averment of Negligence—Plaintiff brought an action to recover damages for personal injuries sustained while making a coupling. The petition averred that plaintiff stepped between a moving car and the engine to uncouple the same; that this might have been done safely if those in charge of the engine whose duty it was to be watchful of plaintiff, had exercised due care and promptly obeyed his signals: that his leg was caught under the pilot, and that he gave a signal to stop the engine which was not heeded, and the engine was not stopped until after he had sustained the injury for which damages were sought. *Held*, that an instruction that plaintiff could not recover on the ground that the fireman failed to observe that he went between the engine and the car, because plaintiff did not allege any negligence in that respect, was properly refused. *Neville v. Chicago & N. W. R. Co.*, Iowa Sup. Ct., Jan. 31 1890.

Same—Sufficiency of Allegations—Evidence—In an action to recover damages for negligence, the plaintiff must allege in his complaint the acts or omissions of the defendant upon which he bases his right to recovery, and show that they occurred through or by the negligence of the defendant. The plaintiff must state the facts constituting his cause of action. He cannot state one and prove another. Nor, if he states one, can he supply the defects in his complaint by evidence at the trial. In such action the evidence on the part of the plaintiff must be directed to the proof of the facts alleged, and the instructions of the court must be confined to the allegations and proofs. It is the law arising upon those allegations, and upon the evidence offered to sustain them, which the court is to give to the jury. It is the facts thus ascertained, and the law applicable to them, which will authorize a verdict. *Woodward v. Oregon R. & Nav. Co.*, Or. Sup. Ct., Jan. 6, 1890. STRAHAN, J., who delivered the opinion of the court, said: Instructions numbered 3 and 5 present somewhat analogous questions, and may be considered together. The point of obligation to these instructions is that they submit to the jury questions entirely outside of and beyond the allegations of the plaintiff's complaint, and apparently leave it to the jury to find as they may think proper, regardless of the particular acts of negligence charged in the complaint; and this leads us to the inquiry whether or not the plaintiff must allege the particular acts of negligence constituting his cause of action, and then confine his proof to those specific allegations. Our Code, § 66, requires the complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action; and one of the great objects to be attained by this enactment was to compel the plaintiff to place upon the record the specific and particular facts which he claims entitle him to recover. The field of inquiry is thus narrowed, and the defendant is enabled to come into court advised beforehand of the particular facts he must come prepared to contest. Does this rule apply to an action of negligence? In *Heilner v. Union County*, 7 Or. 84, this court held, in an action for negligence in allowing a bridge to be and remain out of repair, that the facts constituting the negligence should be averred. So it was held, in *Lakin v. Oregon Pac. R. Co.*, 15 Or., 220, 34 Am. & Eng. R. Cas. 500, that a defect of a car or an engine could not be

shown in an action where the damage was alleged to have occurred through the negligence of the employes, and the defects of the engine or machinery were not relied upon as a cause of action. *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo. 514, is more directly in point. It was there held that where the allegation in a petition against a railroad company is that the plaintiff received the injuries complained of through the negligence of the company in having and using defective machinery, and the running and managing its railroad and cars, and the proof was that the injury was occasioned by a broken frog, the plaintiff could not recover. To the same effect is *Meyer v. Atlantic, etc., R. Co.*, 64 Mo. 542. In that case the court said: 'It is only by statutory enactment that defendant is required to sound the whistle or ring a bell eighty rods distant from a point where the railroad crosses a public road; and, if defendant was intended to be made liable on account of this neglect, such intention should in some manner have been expressed in the petition, either by statement of the facts which, under the statute, created the liability, or by some appropriate reference to the statute itself.' So, in *Edens v. Hannibal & St. J. R. Co.*, 72 Mo. 212, 5 Am. & Eng. R. Cas. 459, it was held that whatever was the real ground of complaint should be stated in the petition. Hence in an action against a railroad company to recover for injuries alleged to have been sustained through the company's negligence, if the negligence consisted in having a defective sand-box on the engine, and in keeping a defective frog in the track, the petition should not charge negligence in running the cars. So, in *Field v. Chicago, R. I. & P. R. Co.*, 76 Mo. 614, the court said: 'The plaintiff must state the facts which constitute his cause of action. He cannot state one and prove another; nor, if he states none, can he supply the defects in his petition by evidence at the trial.' So, also, in *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425, it was held, in an action against a railway company to recover damages for the killing of the plaintiff's intestate, through negligence and carelessness in the managing and running of a train of cars, the declaration should show in what such negligence and carelessness consisted, and not charge the same in general terms, without disclosing any specific acts or omissions; and *Thomas v. Georgia. R. & B. Co.*, 40 Ga. 231, holds that a plaintiff must recover on the particular acts of negligence charged in the complaint, and that other acts of negligence not alleged, cannot be made the basis of a recovery. So, in *Long v. Doxey*, 50 Ind. 385, it was held that a right to recover on a complaint charging negligence in the use of defective machinery could not be supported by proof of negligence in employing unskillful men to run the machinery. So, also, in *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, in an action for negligence, it was held that an act the doing of which was complained of, and that such act was negligently done, must be alleged; also, that when the act complained of was sufficiently stated it was only necessary to aver that such act was negligently done, without setting out in detail the particulars of the negligence. It is true, in some jurisdictions, it seems to be held sufficient to allege generally that the injury complained of was carelessly and negligently inflicted upon the plaintiff, or that, by reason of the carelessness and negligence of the defendant, the plaintiff was injured; but this mode of statement has never been sanctioned or approved in this state, is at variance with the plain requirements of the Code, and would give the defendant no notice of the acts claimed to be negligent, so that he might come prepared to meet them."

MCMASTER

v.

ILLINOIS CENTRAL R. CO.

(65 Miss. 264.)

Fellow-Servants—Brakeman of Freight and Employes Operating Passenger Train.—The brakeman of a freight train is the fellow-servant of the conductor, and other employes in charge of and operating a passenger train of the same company, and cannot recover for injuries caused by the negligence of the train hands on the passenger train.

Wrongful Death—Conflict of Laws—Lex Loci.—Where an action is brought for damages for personal injuries, or for negligently causing death, and the injury complained of occurred in another state, the rights and liabilities of the parties in relation to it are governed by the laws of the state where the injury occurred.

APPEAL from Circuit Court, Copiah County.

Action to recover damages for the killing of plaintiff's son, a brakeman in the employ of the defendant. The accident occurred in the state of Louisiana, and the declaration alleged that it was caused by the negligence of the conductor and other employes of a passenger train who were informed that plaintiff had probably fallen from the freight train upon which he was employed, and were warned to run cautiously and keep a lookout for him, but who recklessly and willfully proceeded at the usual speed, and ran over and killed him. Plaintiff appeals from a judgment sustaining a demurrer to the complaint.

L. B. Harris for the appellant.

W. P. and J. B. Harris for the appellee.

ARNOLD, J.—If a brakeman on one train of a railroad company is a fellow-servant of the employes in charge of or operating another train of the same company on the same road, the declaration was demurrable.

There is some diversity of authority as to who are fellow-servants within the meaning of the rule which exempts the master or employer from liability to those engaged in his employment, for injuries suffered by them, as the result of the negligence or misconduct of other servants employed by him and engaged in the same common business; but subjection to control and direction by the same common master in the same common pursuit furnishes the true test of co-service. When servants are employed and paid by the same master, and their duties are

Test of co-
service.

such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common business; and being subject to the control of the same master, they are fellow-servants, within the generally accepted meaning of the rule, no matter how different the grades of service or compensation may be, or how diverse or distinct their duties may be. 3 Wood's Railway Law, 1494 *et seq.* And when the relation of fellow-servants is established, there can be no recovery from the common master or employer by one of them for an injury occasioned to him through the negligence or misconduct of his co-employee.

In order to render the master liable in such case, it would be necessary to show that the negligent servant was incompetent, and that he was selected without reasonable care and prudence, or that he was continued in the employment after notice to the master of his unfitness, or that the master had failed to furnish adequate means and materials for the work.

Liability of
employer for
incompetent
servants.

Such is the law of this state, and such is the law as it has generally prevailed, in America and England for many years. New Orleans, J. & G. N. R. Co. *v.* Hughes, 49 Miss. 258; Chicago, St. L. & N. O. R. Co. *v.* Doyle, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; Louisville, N. O. & T. R. Co. *v.* Conroy, 63 Miss. 562; 56 Am. Rep. 835; Randall *v.* Baltimore & O. R. Co., 109 U. S. 478, 15 Am. & Eng. R. Cas. 243; Murray *v.* South Carolina R. Co., 1 McMull. (S. Car.), 385; 36 Am. Dec. 268, and note; 3 Wood's Railway Law, 1494, *et seq.* For the purposes of this case, it is not necessary to collect more of the numerous decisions, English and American, on the subject; that is well done in the three authorities last above cited.

The doctrine in question was first asserted by the supreme court of South Carolina in 1841, in Murray *v.* South Carolina R. Co., 1 McMull. (S. Car.), 385, 36 Am. Dec. 268. It may will be termed the South Carolina doctrine. Chicago, M. & St. P. R. Co. *v.* Ross, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501; Murray *v.* South Carolina R. Co., 1 McMull. (S. Car.), 385, 36 Am. Dec. 268, and note.

The reason upon which it is based cannot be better stated than by quoting from the opinion of the supreme court of Massachusetts in Farwell *v.* Boston & W. R. Co., 4 Met. (Mass.), 49, 38 Am. Dec. 339, which has long been considered a leading case both in this country and England. Chief Justice SHAW, in delivering the judgment of the court, said: "The general rule resulting from considerations as well of justice as of policy, is, that he

Farwell *v.*
Boston & W.
R. Co.

who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved. They are his agents to some extent and for some purposes; but whether he is responsible, in a particular case, for their negligence is not decided by the single fact that they are for some purposes his agents. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer. * * *

"It was strongly pressed in the argument that although this might be so where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one

can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments? * * * *

"Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master in the case supposed is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort as for the negligence of his servant because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant."

But the injury complained of in this case having occurred in Louisiana, the rights and liabilities of the parties in relation to it are governed by the laws of that state.

Chicago, St. L., etc., R. Co. v. Doyle, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171. We find that the law of Louisiana on the subject is different from that of Mississippi and most of the other states of our Union. In *Towns v. Vicksburg, S. & P. R. Co.*, 37 La. An. 630, 55 Am. Rep. 508, and in *Van Amburg v. Vicksburg, S. & P. R. Co.*, 37 La. An. 650, 55 Am. Rep. 517, the supreme court of that state approves and adopts the doctrine announced by the supreme court of the United States in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501. But this does not change the legal aspects of the case at bar. Four

Conflict of
laws.

of the judges of the supreme court of the United States dissented in the case referred to, and the decision of the majority is contrary to the general course of judicial opinion in this country and in England; and it does not go further than to hold that the conductor of a railway train who commands its movements, and controls the employes upon it, is not the fellow-servant of the other employes on that train, but is the vice-principal representing the company, and that the company would be liable for a negligent act of his which resulted in injury to another employe on the train. On the authority of that case, the conductor, while not the fellow-servant of other employes on the train subject to his direction and authority, might well be, and under the law as it is generally understood and interpreted would be, the fellow-servant of other employes of the company in the same common business over whom he had no supervision or control.

It follows, from what has been said, that the brakeman on the freight train and the employes in charge of the passenger train were fellow-servants, and that the action of the court below in sustaining the demurrer to the declaration was free from error.

Affirmed.

SMITH

v.

CENTRAL RAILROAD & BANKING CO.

(*Georgia Supreme Court, September 23, 1889.*)

Trespasser—Contributory Negligence—Failure to Watch for Approaching Trains—Partial Damages.—Where the evidence shows that plaintiff went upon a railroad track for the purpose of going to a house 200 yards distant; that he could have reached his destination by either of two roads which ran along the different sides of the railroad; that along each side of the track there were, in addition, smooth ways 7 and 10 feet wide respectively; and that he failed to exercise proper care by looking and listening for the approach of the train, he is guilty of gross negligence which precludes recovery, although the employes in charge of the train failed to give proper signals, to check it at public crossings, and ran it at too high a rate of speed, and under such circumstances he has no right of recovery, under the provisions of the Georgia statute authorizing a verdict of partial damages where a person injured by a railroad company has been guilty of contributory negligence.

ERROR from Superior Court, Clayton County.

Stewart & Hodnett, J. H. Spence and R. T. Dorsey for plaintiff in error.

W. L. Watterson and Hall & Hammond for defendant in error.

BLECKLEY, C. J.—The former review of this case (*Central R. & B. Co. v. Smith*, 78 Ga. 694, 34 Am. & Eng. R. Cas. 1,) was based upon the refusal of a new trial which was applied for by the company, Smith having obtained a verdict for \$4,800 damages. The motion for a new trial was predicated, not alone upon questions of law ruled upon by the court in the progress of the trial, but upon the insufficiency of the evidence to warrant a recovery. Passing upon the whole case this court held that, "as matter of fact, to walk along the middle of a railroad track between crossings when it is dark, and without knowing and remembering whether a train is due or not, and without looking in both directions for trains that may be due, and without listening attentively and anxiously for the roar and rattle of machinery, as well as the sound of bell or whistle, is gross negligence;" and that the evidence did not warrant the verdict. A new trial was had, when the same evidence was submitted by the plaintiff on which he had previously sought and obtained a verdict; and the court, properly respecting the decision which he had rendered touching the insufficiency of that evidence, granted a nonsuit; and this judgment of nonsuit we are now called upon to reverse.

Decision on
former ap-
peal.

1. Had we not, by holding up the case for more thorough and elaborate treatment, found leisure for studying it a second time in all its details, we might very well have disposed of it by a simple reference to the report and opinion in 78 Ga. 694, 34 Am. & Eng. R. Cas.

Effect of de-
cision on
previous ap-
peal.

1. The necessary logical outcome of our previous ruling was a defeat of the plaintiff on a second trial, provided his evidence was the same as on the first. The court may not have been obliged by law to grant the motion to nonsuit, but there can be no reasonable doubt that the presiding judge was authorized to do so, for he had before him a solemn decision of this court holding that a recovery upon that evidence was not sustainable. Independently of our decision, it was in the power of the court to grant the nonsuit, though to grant it may not have been obligatory. *Tison v. Yawn*, 15 Ga. 491; *Cook v. Western & A. R. Co.*, 69 Ga. 619; *Bell v. Western & A. R. Co.*, 70 Ga. 566; *Donaldson v. Milwaukee & St. P. R. Co.*, 21 Minn. 294; *Rothe v. Milwaukee & St. P. R. Co.*, 21 Wis. 258; *O'Donnell v. Missouri Pac. R. Co.*, 8 Cent. Law J. 414.

2. But our further study of the case prepares us to deal with it again *de novo*, and we do so without committing ourselves, however, to repeat a like superfluous treatment of any case hereafter. Smith was a man 33

Facts. years of age, residing in or near Jonesboro. For a period of 15 years he had clerked in a store in that town, his employment as clerk ceasing about a year before he was hurt. He thus had opportunity to be well acquainted with the locality, and there is no intimation that he was not familiar with it, or that he was deficient in any of his faculties or senses. Shortly before daylight, on February 7, 1885, he walked from a street crossing in the town of Jonesboro upon the railroad track, for the purpose of going about 200 yards down the track to a house where he had business. He had proceeded 65 or 70 yards when the train, coming up from behind, struck him and inflicted a serious injury to his person. He was walking in the middle of the track, and the first he knew of the train it was right at him. He made a break to get off, but was too late. He could not get out of the way. He testified as his own witness, but gave no reason or explanation, and none appeared from any other testimony, as to why he did not listen or look, or as to what was occupying his attention, or as to there being anything visible or tangible which could have occupied it. He introduced several other witnesses, one of whom stated that it was a cold morning, and that the noise of the train could be heard a long way off; another stated that he heard it a quarter of a mile; another that he heard it half a mile above the depot, and all the way through town; another that he heard it three-quarters of a mile before it got to the crossing. All concurred that the speed of the train was very high, some estimating it as high as 40 miles, and one at 45 miles, an hour; none of them at less than 25 miles an hour. The house to which the plaintiff was going could have been reached by a good road running down on one side of the railroad, and by another, not so good, on the opposite side. In addition to these ways of access, there was, on each border of the track upon which he walked, a smooth way; that on one side being, by actual measurement, 7, and that on the other 10, feet wide. The train was the regular 5 o'clock passenger train, and was that morning on its schedule time.

It is beyond dispute that the railroad company was negligent. It failed to give the signals, to check the train at public crossings, and was running at a speed altogether too high. Enough, and more than enough, appears to fix liability upon the company, if only its negligence were involved.

But the evidence makes the plaintiff's negligence quite as

apparent as that of the company; not only so, but it shows, in the fullest and clearest light, that by the use of ordinary care he could have avoided the consequences to himself of the company's negligence; and, that being so, the Code (section 2972) declares, in express terms, that he is not entitled to recover.

Recovery precluded by plaintiff's gross negligence.

This rule of law it is that bars him, and renders a recovery impossible. It is idle to try to evade the rule by dwelling upon the negligence of the company, for unless there is negligence of the company which would otherwise render it liable, the rule we are considering would have no place in the law. It is only where there is negligence, the consequences of which are to be shunned, that the plaintiff is charged with the duty of shunning them, if he can do so by the exercise of ordinary care. His failure in this respect does not stop with reducing the amount of his damages, but defeats a recovery altogether. *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604, and cases cited in the able opinion of BRANHAM, J. Nor is this mere Georgia law dependent on a local statute, but the principle prevails elsewhere. *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697; *Donaldson v. Milwaukee & St. P. R. Co.*, 21 Minn. 293; *Harty v. Central R. Co. of New Jersey*, 42 N. Y. 468; *O'Donnell v. Missouri Pac. R. Co.*, 8 Cent. Law J. 414; 2 *Shear. & R. Neg.* §§ 480-482; 1 *Thomp. Neg.* 449 *et seq.*, notes. In all the cases cited by the able and zealous counsel for the plaintiff there were complicated facts, or else some explanation, either furnished or suggested by the evidence, which might serve to account, in whole or in part, for the apparent failure by the party injured to protect himself; something from which the jury might by possibility infer that the attention was naturally and justifiably withdrawn for the moment from the danger or the cause of danger. We except, of course, the two cases of *Western & A. R. Co. v. Main*, 64 Ga. 649, and *Same v. Jones*, 65 Ga. 631, 8 Am. & Eng. R. Cas. 267, for these were not cases of injury to the person, but to animals. In them no question of diligence on the part of the owners arose, and the law lays no duty of diligence whatever upon cattle and horses. In *Hankerson v. Southwestern R. Co.*, 59 Ga. 593, the plaintiff suddenly became unconscious, and while in that condition was injured, and did not recover consciousness until some time afterwards. *Vickers v. Atlantic & W. P. R. Co.*, 64 Ga. 306, 8 Am. & Eng. R. Cas. 337, was the case of a child; *Fraser v. Charleston & S. R. Co.*, 75 Ga. 222, was the case of a woman; in both there were special circumstances rendering the question of diligence somewhat

doubtful. They were very weak cases (and so pronounced) for submission to a jury, but the special facts made it proper to give them that direction. *Atlantic & W. P. R. Co. v. Wyly*, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262, involved the question of prudence in attempting to pass over a street crossing with a dray, and the report states expressly that the evidence was conflicting. The cases of *Central R. Co. v. Freeman*, 66 Ga. 170; *Cook v. Western & A. R. Co.*, 69 Ga. 619; *Georgia R. Co. v. Pittman*, 73 Ga. 325, 26 Am. & Eng. R. Cas. 474; *Redding v. East Tennessee, V. & G. R.*, 74 Ga. 385,—were cases in which the injured persons were engaged in the performance of duties as employes,—duties calculated more or less to divert their attention from the causes of danger. In *Georgia R. Co. v. Carr*, 73 Ga. 557, there was no intrusion upon the railroad track, and no cause to apprehend the particular danger which produced the disaster, namely, the blowing of the locomotive whistle, until it was too late to shun it. So it is stated in the opinion, (page 560.) In *Brunswick & W. R. Co. v. Hoover*, 74 Ga. 429, the injury occurred at a public crossing, and a whistle was blown on another railroad, which attracted attention, and perhaps caused mistake. There was also a ditch, which was mentioned by the court as an obstacle to escape, in discussing the plaintiff's diligence. In *Georgia R. Co. v. Williams*, *Id.* 723, and *Western & A. R. Co. v. Meigs*, *Id.* 857, other trains were near, and the injured person's attention might have been directed to them, and thus withdrawn from the danger that threatened. In *Jackson v. Georgia R. Co.*, 77 Ga. 82, in which the injury resulted from the breaking of something connected with a derrick, the plaintiff acted under orders, merely yielding his own apprehensions, founded on report, to the assurance of the person in charge of the work. The present is distinguishable from all these cases; for the plaintiff, although a witness himself, and though in full possession of his faculties, and recollecting all that transpired, gives no hint of any reason why he walked upon the track when he might easily and safely have walked on either side of it; or why, being upon it, he exercised no diligence whatever in listening, looking for, or thinking about, the train. He does not pretend ignorance that it was train time, or suggest any mistake or misapprehension on the subject. He testifies simply to the physical facts, and there leaves the matter. From these facts no enlightened, unbiased jury could rightly draw any inference other than that he was grossly negligent, and that, by the exercise of any reasonable diligence whatever, he could, and should, have avoided injury. When it would be impossible for a jury rightly to arrive at but one conclusion, the court is not bound

to take the opinion of a jury, even upon a question of negligence. When they are consulted, they are the sole and exclusive judges, as has been held in many cases, notably in *Richard & D. R. Co. v. Howard*, 79 Ga. 44, and *Killian v. Augusta & K. R. Co.*, 79 Ga. 236. But this rule does not mean that the court cannot adjudicate, as a question of law, on a motion for a nonsuit, that there is nothing for the jury to try. In adjudicating motions for nonsuit, a court must necessarily have the same power over questions of negligence as even other questions of fact. Otherwise, cases of this character would be so exceptional that they would have to be submitted to a jury, however deficient the evidence might be. The law of nonsuit, as to them, would be a nullity.

We have at least done this case full justice in giving it patient and protracted consideration, and, with full confidence in the correctness of our conclusion, we leave it where the judgment of the court below placed it.

Judgment affirmed.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

v.

HULL.

(*Tennessee Supreme Court, October 13, 1889.*)

Comparative Negligence—Rule in Tennessee—Instructions.—The doctrine of "comparative negligence" does not prevail in Tennessee, and it is error to charge the jury in such terms as to authorize them to make a comparison of the negligence of the plaintiff and defendant respectively, and to return a verdict for the plaintiff if the jury should be of the opinion that the injury was caused by the greater or grosser negligence of the defendant.

ERROR to Circuit Court, Sullivan County.

Thomas Curtain and Taylor & St. John for plaintiff in error.
Haynes & Haynes for defendant in error.

FOLKES, J.—The railroad company has appealed in error from the verdict and judgment against it for damages for personal injury occasioned by a train of cars belonging to and operated by it. The facts of the case need not be stated, in the view we have taken of the case.

For the plaintiff in error, it is insisted that the judgment should be reversed for error in the charges of the court upon the law of negligence. The portion of the charge objected to is as follows: "If the proof should show that it was the greater or grosser negligence of the defendant, through its agents or employees who were

Instruction
excepted to.

the superior of this plaintiff, or by using defective, imperfect, and unsafe machinery, that he was injured, he could recover; but if, at the same time, the evidence shows you that the negligence, or want of care or caution, upon the part of the plaintiff himself contributed to that injury, then that would be contributory negligence, and would be looked to and considered in mitigation of damages; that is, you could not give as much damages for the injury he sustained where his own want of care or negligence contributed as you could when he had been entirely blameless. The greater the contributory negligence upon his part, the less damages, if he should be entitled to any."

This is manifestly erroneous. It invited the jury to a comparison of the negligence between plaintiff and defendant, and directed them to render verdict for the plaintiff if they should be of opinion that the injury was caused by the greater or grosser negligence of the defendant. This charge presents the doctrine of "comparative negligence," which this court has more than once said has never prevailed in this state.

Doctrine of comparative negligence not adopted in Tennessee.

The error of the charge, in this regard, is emphasized by the statement, in that connection, concerning the doctrine of contributory negligence. The jury were nowhere told that the negligence of the plaintiff which might and ought to be considered in mitigation of damages should be such as contributed remotely, and not directly, to the injury; and that, if the negligence of plaintiff contributed directly to the injury, as the proximate cause thereof, instead of remotely, such negligence would be a complete bar to any recovery. Contributory negligence on the part of the plaintiff is, when it proximately contributes to the infliction of the injury, a bar to an action, because a person cannot be permitted to rush upon an apparent danger, and then, because an injury ensues to him, to be allowed to saddle the other party with the pecuniary consequences of an injury which his own want of care has brought upon him. But if the damage is not the necessary or ordinary or likely result of such contributory negligence, but is due to some wholly unlooked for and unexpected event, which could not reasonably have been anticipated or regarded as likely to occur, such contributory negligence is too remote to be set up as a bar to the action. "In all cases where negligence on the part of the plaintiff is remotely connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the remote and indirect negligence of the plaintiff cannot be set up as an answer to the action." 2 Wood Ry. Law, 1254, 1255.

It is unnecessary here to discuss the doctrine of "comparative negligence" as it exists in the states of Illinois and Kansas, and to some extent in Georgia. The subject will be found fully treated in 2 Thomp. Neg. 1164 *et seq.* ^{Authorities distinguished.} It is sufficient to say that it has been expressly repudiated in this state. In the case of *East Tennessee, V. & G. R. Co. v. Fain*, 12 Lea (Tenn.), 35, 19 Am. & Eng. R. Cas. 102, the court permitted the term "more gross" negligence, and other language, in a charge which might ordinarily imply comparison, to pass without violating the verdict, when it was manifest from the context that the terms were limited so as to signify the prime, principal, and proximate cause of the injury, as contradistinguished from the remote cause, and when the charge was elsewhere so explicit as not to permit of the jury being misled by such terms. Now, while it is true that in the case at bar the jury had been told, in general terms, that if, by the exercise of ordinary care, plaintiff could have avoided the injury, he could not recover; and that, if injured by his own negligence, he could not recover; and that, if he were equally blamable with the defendant, he could not recover—yet when the language used is considered in connection with so much of the charge as we have quoted, it is manifest that the objectionable terms were not qualified so as to save the charge, as was held in the cause of *Fain, supra*, and of *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea (Tenn.), 46, 17 Am. & Eng. R. Cas. 568. Instead of leaving it to be studied out whether or no the objectional language has been saved or cured, it would be much better to omit from the charge all language implying a comparison of the negligence between plaintiff and defendant. A correct exposition of the law governing such actions does not require the use of any language of doubtful import. Inasmuch as the case will be tried again in the court below, we express no opinion on the facts of the case as presented in another assignment of error. For the error in the charge as herein shown the judgment must be reversed, and cause remanded.

Comparative Negligence—Rules Adopted by Respective States.—See *Wichita & W. R. Co. v. Davis* (Kan.), 32 Am. & Eng. R. Cas. 65; *Hurt v. St. Louis, I. M. & S. R. Co.* (Mo.), 34 *Id.* 422; *Matti v. Chicago & W. M. R. Co.* (Mich.), 32 *Id.* 71; *East Tennessee, V. & G. R. Co. v. Malloy* (Ga.), 31 *Id.* 352; *Georgia R. Co. v. Ivey* (Ga.), 28 *Id.* 392; *Mynning v. Detroit, L. & N. R. Co.* (Mich.), 23 *Id.* 317; *Louisville & N. R. Co. v. Fleming* (Tenn.), 18 *Id.* 347; *Peoria & P. U. R. Co. v. Clayberg* (Ill.), 15 *Id.* 356, note 361; *Terre Haute & I. R. Co. v. Graham* (Ind.), 12 *Id.* 77; *Kansas Pac. R. Co. v. Peavy* (Kan.), 11 *Id.* 260; *Chicago, B. & O. R. Co. v. Johnson* (Ill.), 8 *Id.* 225, note 237; *Chicago & N. W. R. Co. v. Dimick* (Ill.), 2 *Id.* 201; *Pennsylvania R. Co. v. Righter* (N. J.), 2 *Id.* 220; *Stratton v. Central City Horse R. Co.* (Ill.), 1 *Id.* 115.

41 A. & E. R. Cas.—32

HOOKER

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(Wisconsin Supreme Court, March 18, 1890.)

Speed—Statute Limiting Rate in Cities—Construction.—A statute which provides that "in all cities and villages * * * no train or locomotive shall go faster, until after having passed all the travelled streets thereon, than at the rate of 6 miles per hour," prohibits the running of a train which has entered a city at a rate of speed in excess of that prescribed by the statute although it has not reached a travelled street.

Same—Unlawful Rate—Negligence of Engineer.—In an action for damages for causing the death of plaintiff's daughter, it appeared that the accident occurred on a bridge 138 feet long; that the engineer had an unobstructed view of the bridge from a point 1168 feet distant; that he saw the deceased and her companions on the bridge when the train was about 960 feet from them; that the train was running at the rate of 25 to 30 miles an hour and could only be stopped in about 1000 feet; that if it had been running at the statutory rate of 6 miles per hour, (the locality being within the limits of a city) it might have been stopped within 600 or 700 feet, and that the engineer as soon as he saw the persons on the bridge, sounded the danger signals, and the brakes were set. *Held*, that the unlawful rate of speed was material, and that the evidence sufficiently showed negligence on the part of the engineer.

Trespassers—License to Use Bridge as Footway.—Where a bridge has been habitually and constantly used for many years by people in the locality as a foot pathway without any objection, notice or warning by the company that it should not be so used, persons walking upon it are licensees and not trespassers.

Same—Personal Injuries—Res Gestæ—Statement of Engineer.—The statement of the engineer made immediately upon stopping his train after running over certain persons, and while going to the place of the accident, that "They had whistled enough for them" is admissible as part of the *res gestæ*.

New Trial—Newly-Discovered Testimony Impeaching Competency of Expert.—A new trial will not be granted upon the ground of newly-discovered testimony impeaching the experience and competency of one of plaintiff's witnesses as a locomotive engineer, and to testify as an expert as to the distance within which a train might be stopped.

APPEAL from Dodge County Court.

John T. Fish and Burton Hanson for appellant.

Harlow Pease for respondent.

ORTON, J.—The facts of this case are briefly as follows:
On the afternoon of the 14th day of September, 1886, the wife
Facts. of the plaintiff, and mother of the little girl, Cath-
arine, deceased, let her go with her little playmate,
Edith Jones, to the house of one Mrs. Dacey, to spend the after-

noon. Mrs. Dacey lived alone, about 325 feet south of the railway bridge, across the west branch of the Rock river, in the city of Waupun, and about 100 feet east of the track. The bridge is 138 feet long, and 76 feet of it, over the water, was inclosed on both sides, and persons going over it had to walk on the ties. It is 1,056 feet south of the north boundary of the city, and about the same distance north of the depot. The road runs north and south through the city, but about 600 feet north of the bridge it curves towards the east. From a point 1,168 feet north of the bridge, on the west side of the track, at the height of an engine cab, the whole track could have been plainly seen, southwards through the bridge, and to Main street beyond, without any obstruction whatever. Mrs. Dacey was a careful, prudent, cheerful, and respectable woman, of mature years, and very fond of children, and had raised several of her own. The little girl, Catharine, was under five years of age. Mrs. Dacey had been walking about with the little girls, trying to entertain them, and they had been throwing pebbles into the water. They came on the bridge at the south end, and walked across to the other end, and then turned around and walked back, as if returning to Mrs. Dacey's house. When nearly through the inclosed part of the bridge, they first heard and saw the train coming towards them, with great speed. Mrs. Dacey appeared to have been paralyzed with fear, and, when they got about three feet from the end of the inclosed part of the bridge, the train passed over and killed all three of them. The road from the north for a considerable distance, and to within a mile of the city, had a descending grade. The train consisted of ten freight and three passenger cars, with the tender and engine. The testimony tends to prove that the train had been running at the rate of 40 miles an hour, until it had approached the city, and that afterwards, when within the city limits, it was run at the rate of from 25 to 30 miles an hour; and that the engineer saw these persons on the bridge when the train had approached a point 965 feet from them, and might have easily stopped the train before it had reached the bridge, even if it had been running at 6 miles an hour. He testified that he could stop the train, within 600 or 700 feet, if it had been running at the lawful speed of 6 miles an hour, and that he might have stopped it, as it was then running, within 1,000 feet, and the evidence was that he might have seen these persons at a point over 1,200 feet from them. The train was behind time, which may account for the fast running. The testimony tended to prove, also, that the bridge had, for many years, and up to the time of the accident, been habitually and constantly used, by men, women, and children, going back and

forth in that part of the city, as a foot pathway, without any objection, notice, or warning by the company, that it should not be so used until after this accident. As soon as the engineer saw these persons on the bridge, he sounded the danger signal, and the brakes were set, but the air-brakes were out of order, and were not used. The plaintiff sues as administrator for his deceased child. The jury rendered a verdict for the plaintiff at \$500, and the defendant's counsel moved to set it aside, and for a new trial on the minutes of the court, and on affidavits showing that one of the plaintiff's witnesses had testified in the trial to that which was not true. The motion was denied.

We will not consider the points made by the learned counsel of the appellant in their order:

1. That the court should have directed a verdict for the appellant. This raises the question of the legal effect of the testimony. The learned counsel of the appellant con-

Statute regulating speed within city limits.

tends that there is no law that prohibited the running of the train at a rate of speed exceeding six miles an hour, after it had entered the city, and until it reached the bridge, because it passed over no traveled streets. Section 1809, Rev. St., provides that "in all cities and villages, * * * no train or locomotive shall go faster, until after having passed all the traveled streets thereof, than at the rate of six miles per hour." This train had entered the city from the north, and was going south. It had not yet come to a traveled street, and, of course, had not passed all the traveled streets in that city. It was just about to come to a traveled street, and if it was running, until then, 25 miles an hour, it could not stop or lessen the speed to 6 miles an hour, before it passed at least one traveled street at an unlawful rate of speed. The statute is well framed to prevent this. It must not run within the city at greater speed than 6 miles an hour, and the only exception is, "after having passed all the traveled streets thereof." The statute appears very plain.

Was such an unlawful speed material in this case? We think it was clearly so. It is quite evident that if the train

Negligence—Excessive speed. had been running only six miles an hour, after it had entered the city, this accident would not have happened. The train could have been easily stopped before it reached the bridge. Mrs. Dacey would have had time to get off the track after she saw it. This train, 550 feet long, was running at an extraordinary and tremendous rate of speed. According to the testimony of the engineer himself, he could have stopped it, if it had been running at a lawful rate of speed. It is hard to believe that the engineer

did not try his best to stop the train. And yet I have no doubt that there have been instances when the engineer did not do so, and was not guilty of any intentional wrong. The engineer does not like to stop his train when he sees a person on the track a considerable distance ahead. He expects that the danger signal will be sufficient. Such instances are not rare, and the person does get off in time, and no harm is done. It is not strange that this practice of taking the chances should become habitual. The engineer in this case no doubt did his best to stop his train, but he may not have tried to do so soon enough, at the tremendous rate of speed he was running. The negligence of the company seems to us to have been established beyond all doubt.

It is further contended, by the learned counsel, that Mrs. Dacey and the children were trespassers on the bridge. We think that there was evidence, which the jury might have believed, that the bridge had hitherto been habitually and constantly used as a pathway to and fro, by the people in that part of the city. Mrs. Dacey was using the bridge as a way through which to get home, and not for play, when the train came in sight. It is clear enough that she was a licensee in the use she made of the bridge, and that she was using it properly and lawfully. The negligence of Mrs. Dacey will be considered hereafter. Aside from that, we think the evidence warranted the verdict.

Licensee upon bridge.

2. Exception was taken to the testimony of the witness Gerrits, of what the engineer said about the accident, about as soon as he stopped his train, south of the bridge and north of the depot, or soon thereafter. The testimony was that when asked, "What have you been doing?" he looked up and said, "They had whistled enough for them." It seems that the engineer was going towards the bridge when this occurred. Whatever the jury might understand was meant by this expression, we are satisfied that it occurred near enough to the accident itself to be a part of the *res gestæ*, and admissible. *Felt v. Amidon*, 43 Wis. 467, and other cases cited in the brief of respondent's counsel.

Declaration—
Admissibility
as *res gestæ*.

3. The newly discovered testimony to impeach Julius Timple, one of the plaintiff's witnesses, as a ground for a new trial, was upon the question of his experience and competency as a locomotive engineer, and to testify as an expert, and the falsity of his testimony as to how soon the train might have been stopped. It does not appear that the testimony of that witness conflicted materially with that of the engineer of the train, upon the real question whether the train might have been stopped before it reached Mrs. Dacey and the children, if it had been run-

New trial—
Newly discovered
testimony.

ning at a lawful rate of speed. At all events, a new trial ought not to be granted on account of newly discovered evidence of mere impeachment. *Bunn v. Hoyt*, 3 Johns (N. Y.), 255; *Shumway v. Fowler*, 4 Johns (N. Y.), 425; *Harrington v. Biglow*, 2 Denio (N. Y.), 109; *Delaney v. Brunnette*, 62 Wis. 615; *Schacherl v. St. Paul City R. Co.* (Minn.), 43 N. W. Rep. 837; *Jones v. Chicago, M. & St. P. R. Co.*, *Id.* 1114. There was no abuse of the discretion of the court in refusing to grant a new trial for such cause. *Smith v. Champagne*, 72 Wis. 480.

The court was requested by the defendant's counsel to instruct the jury, and did so instruct them, and repeated it several times, that if Mrs. Dacey was guilty of a slight want of ordinary care, in going on the bridge with the children, under the circumstances, and that it contributed to or was the proximate cause of, the death of the child Catharine, they should find for the defendant. The learned counsel of the plaintiff excepted to this instruction, and now asks this court to decide, in support of the judgment, that such instruction was erroneous. He contends that the negligence of the temporary custodian of the child ought not to be imputed to the child herself or to the plaintiff. This court has not yet decided that question. It has frequently held, however, that in such a case, where the child is so young as to be *non sui juris*, it is a material question whether the parent was or was not negligent in committing the child to such temporary custodian, and whether such custodian was of proper age and discretion to suitably care for it. There has been no occasion to go further, and decide the above question. *Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 357, 19 Am. & Eng. R. Cas. 74; *Dahl v. Milwaukee City R. Co.*, 62 Wis. 652, 19 Am. & Eng. R. Cas. 121; *Parish v. Eden*, 62 Wis. 272.

The jury considered the question of the negligence of Mrs. Dacey understandingly and fully, as it had been so often impressed upon them by the court, and must have found that she was guilty of no want of ordinary care that contributed to the death of the child. That was a question peculiarly within their province to decide, and their decision of it should be conclusive and a finality if the evidence was not such as to show that she was negligent beyond all question. *Randall v. Northwestern Teleg. Co.*, 54 Wis. 140; *McNamara v. Clintonville*, 62 Wis. 207; *Hill v. Fond du Lac*, 56 Wis. 246; *Kaples v. Orth*, 61 Wis. 531; *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145, 19 Am. & Eng. R. Cas. 285. We cannot say from the evidence that Mrs. Dacey was guilty of any want of ordinary care in going upon the bridge with the

Negligence of
person in cus-
tody of child.

children. She had lived near the railroad for several years but she might not have remembered at what time the train was due, or she may have thought it had already gone by.

What were the reasons that actuated her, if she had any beyond merely entertaining the children, we cannot know. If her negligence is to affect the rights of the plaintiff, it should certainly be very clearly proved. We think the jury were warranted in finding that she was not guilty of any want of ordinary care that contributed to the accident. It is therefore unnecessary to decide that she could not be chargeable with negligence in taking care of the child, even to support the judgment. The question is therefore hardly before us, or in such way as to be proper to decide it. The courts of the different states are in irreconcilable conflict on the question, so that our decision of it will have to depend upon which side is the better reason, rather than upon the weight of authority. It is a question of considerable importance, and we will defer the decision of it until it becomes material in the case. The instructions of the court to the jury were very favorable to the appellant. They embrace all that ought to have been given of those that were requested. The circuit court committed no error of law that ought to reverse the judgment. The judgment of the circuit court is affirmed.

Injuries to Licensees using Track.—See *Memphis & C. R. Co. v. Womack* (Ala.), 37 Am. & Eng. R. Cas. 308; *St. Louis, A. & T. R. Co. v. Crosnoe* (Tex.), 37 *Id.* 313, note 319; *South & North Ala. R. Co. v. Donovan* (Ala.), 36 *Id.* 151; *Troy v. Cape Fear & Y. V. R. Co.* (N. Car.), 34 *Id.* 13, note 20; *Virginia Midland R. Co. v. White's Adm'r* (Va.), 34 *Id.* 22.

Habitual use of Bridge by Foot Travelers—Instructions—Knowledge of Engineer—Excessive Speed.—Plaintiff's intestate was killed while walking upon a railroad bridge within a city. A city ordinance was put in evidence which limited the speed of trains within the city to 5 miles an hour, and the court instructed the jury that, taking the facts and evidence to be true, and if the train of the defendant was run at such a rate of speed that the engineer could not control it, and if he knew that people were in the habit of crossing the bridge from day to day, such facts, in connection with the ordinance, constituted negligence. *Held*, that the instruction was erroneous in so far as it assumed that there was testimony tending to show that the train was running so rapidly that the engineer could not control it, and that the engineer knew that people were in the habit of crossing daily over the bridge, and also in so far as it confined the attention of the jury to the proof of these facts as establishing the defendant's negligence. *Southerland v. Wilmington & W. R. Co.*, N. Car. Sup. Ct., March 31, 1890.

Person Walking on Track—Injury by Substance Thrown from Train—Sufficiency of Evidence.—The plaintiff in an action was injured while walking on a railroad track which had been used for over 20 years as a pathway between two towns. While so walking he heard a coming train, and stepped off the track, placing himself on an embankment some 8 or 9 feet from the track. Just as the engine and tender, which constituted the train, passed him, he saw the shadow of something in the air and was felled to the ground. The accident happened about noon. In the afternoon

plaintiff returned to the place of the accident, and there found a piece of wood similar to that used for firing up locomotives on the defendant's road, and supposed it was the piece which struck him. It was imbedded in the bank where he was standing. Plaintiff's witnesses testified that the train was running at an unusual speed—according to some, at the rate of 60 miles an hour. *Held*, that as there was no contractual relation between the plaintiff and the defendant, there was no presumption of negligence against the defendant, and the evidence was insufficient to show that the plaintiff was injured by the piece of wood, or that it came from the locomotive or tender, the plaintiff could not recover. *Lucas v. Richmond & D. R. Co.*, 40 Fed. Rep. 566.

Injuries to Boy on Freight Car—Evidence—Signals—Existence of Fence—Custom of People to Cross Switch.—Where the plaintiff, a boy 11 years of age, sues to recover damages for injuries sustained by being thrown from a freight car upon which he had climbed, and which stood upon a side-track, evidence showing that there was no railing between the depot or the ground bordering on the side-track and the side-track itself, and that persons were in the habit of crossing the switch, and that no bell was rung or whistle blown by those in charge of a train in coupling it to the car is irrelevant, as it does not tend to throw any light on the negligence of the boy in being on the car, or the negligence, if any, of the employes causing his death, or that the latter had any knowledge of his presence. *Louisville & N. R. Co. v. Hurt*, Ky. Ct. App., March 18, 1890.

Evidence—Admissibility of Declarations of Engineer at Coroner's Inquest.—Where the plaintiff sues to recover damages for the death of his intestate who was run over by one of defendant's trains, it cannot be shown on the part of the plaintiff by another witness what defendant's engineer, who was in charge of the engine when plaintiff's intestate was killed, said when examined as a witness at the coroner's inquest held the day after the accident, and an error in the admission of such testimony is not cured by the admission of the engineer on cross-examination that he made the statement at the inquest which had been testified to by the plaintiff's witnesses, such testimony being admissible only, if at all, for the purpose of impeaching the credibility of the engineer, and not as substantive evidence to show that the engineer was negligent in failing to keep a lookout to ascertain whether the track was free from obstructions. *Southerland v. Wilmington & W. R. Co.*, N. Car. Sup. Ct., March 31, 1890.

Injuries to Trespasser—Expression of Opinion of Witness.—Where a witness testifies that the deceased, who was run over by a train, got off the track a distance of about 4 feet before the engine came along; that "the suction or force of the train drew him back and he fell in front of the engine," and also that the deceased got off the track as far as he could before the train sucked him under, the statements that the deceased was drawn in front of the train by the suction are properly struck out, being merely the expression of the witness's opinion. *Sherley v. Evansville & T. H. R. Co.*, Ind. Sup. Ct., Jan. 11, 1890.

Same—Evidence as to Intoxication of Injured Person.—Where the plaintiff, in his evidence, has introduced testimony that the deceased drank no intoxicating liquors, and that he was sober on the afternoon of the day upon which the injury occurred, the deceased having been killed in the evening, he cannot complain of the introduction of evidence on behalf of the defendant to the effect that the deceased was intoxicated on that afternoon. *Sherley v. Evansville & T. H. R. Co.*, Ind. Sup. Ct., Jan. 11, 1890.

PENNSYLVANIA R. CO.

v.

McMULLEN.

(Pennsylvania Supreme Court, February 3, 1890.)

Trespassers—Infant—Contributory Negligence.—A boy, ten years of age, who was lying on his back on a railroad track, crosswise the track, with his feet reaching over the rails and his head between the rails, was a trespasser, and no recovery can be had for his death although he could not, on account of his youth, be held accountable for his own negligence.

ERROR to Court of Common Pleas, Philadelphia County.

Action to recover damages for the death of plaintiff's infant son. There were two trials of the case. A non-suit having been entered on the first trial and upon motion having been taken off, at the second trial the case was submitted to the jury on the same evidence, and a verdict for the plaintiff for \$1,500 was rendered. The defendant brings error.

Gravin W. Hart and David W. Sellers for plaintiff in error.
William H. Burnett for defendant in error.

GREEN, J.—On the trial of this case the plaintiff examined but one witness to prove the fact and the circumstances of the accident. This is the account she gave of the occurrence: "*Question.* Please state just what you saw of this accident. *Answer.* When I saw the child he was lying on the flat of his back; his head towards the station-house, and his feet towards me. *Q.* How was his body,—on the track? *A.* Right in the middle of the track his body was; and his head. *Q.* Between the tracks, between the rails, do you mean? *A.* Yes, sir. *Q.* Crosswise? *A.* Yes, sir; his feet towards me, and his legs hanging over. *Q.* How near was it to your house? *A.* Right opposite the east window towards Dauphin street. *Q.* Which window was you looking out of? *A.* The last one towards Dauphin street. *Q.* What room of that house? *A.* There was only one room of that house. *Q.* What happened after that? *A.* I saw him before the cars moved at all. They were just slightly moving; just commencing in motion; and he of course didn't make no effort to get up. I said to my step-mother, 'There's a child on the track, and he'll be run over,' and she started out on Blair street and commenced to halloo, and I went out front. *Q.* That is, ont on Trenton avenue? *A.* Yes, sir. The first car went over him, and cut his foot right off. Then four car-wheels went

Facts.

over him before there was any assistance came." The witness had previously testified that there was a train of small coal-cars standing on the track, reaching nearly a square, the majority of which were full, and it was under these cars that the boy was lying on his back immediately before and at the time he was run over and killed. She also said the whole train was coupled together, that there was no opening between the cars, and the place of the accident was between two streets. There was no contradiction of these facts; on the contrary, they were confirmed by the defendant's witnesses as to everything they saw, but none of them saw the actual collision. Several of the trainmen who were examined came to the spot immediately after the accident, and one of them lifted the boy out from underneath the car. Two of them testified to seeing a pan about half full of coal by the side of the boy, and one of them removed it.

The undisputed facts therefore are that the boy, just before the accident was lying on his back on a railroad track, cross-wise the track, with his feet reaching over one of the rails, and his head between the rails. The train was just starting, and was moving slowly, so that it was stopped when four wheels had passed over the boy. He was lying underneath the cars, and there is no evidence that he was endeavoring to cross the track.

As a matter of course he was not, and could not be, in such circumstances, in the exercise of any legal right. Railroad tracks are not made for persons young or old to lie down upon in any circumstances; much less so when cars are standing on the track. They are not intended for any such use, and any person who makes such use of a track is undoubtedly a trespasser. The question is not an open one. Had this boy been an adult, as a matter of course he could not have recovered, both because of his own negligence and of his being a trespasser. The boy was 10 years old, and therefore cannot be held accountable for his own negligence. But, as a clear trespasser, recovery is equally impossible, notwithstanding his youth, and this we have many times decided. In every one of the following cases we held there could be no recovery although the persons injured were children, upon the express ground that they were trespassers. *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210; *Duff v. Allegheny Val. R. Co.*, 91 Pa. St. 458; 2 Am. & Eng. R. Cas. 1; *Cauley v. Pittsburg C. & St. L. R. Co.*, 95 Pa. St. 398, 2 Am. & Eng. R. Cas. 4; 98 Pa. St. 498, 4 Am. & Eng. R. Cas. 533; *Hesterville Pass. R. Co. v. Connell*, 88 Pa. St. 520; *Moore v. Pennsylvania R. Co.*, 99 Pa. St. 301; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. St. 258, 8 Am. &

Decedent
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liable.

Eng. R. Cas. 544. In several of them the child was considerably younger than in this case. In not one of them was the trespass of the child so gross, so palpable, so conspicuous as in this. The doctrine has been so elaborately discussed and so fully expounded and illustrated in several of the opinions of this court in the cases referred to that it is entirely unnecessary to repeat the discussion here. We are clearly of opinion that the defendant's ninth point should have been affirmed, and a verdict for the defendant directed.

Judgment reversed.

Contributory Negligence of Infants.—See *Stone v. Dry Dock, E. B. & B. R. Co.* (N. Y.), 38 Am. & Eng. R. Cas. 489; *Western & A R. Co. v. Young* (Ga.), 37 *Id.* 489; *Twist v. Winona & St. P. R. Co.* (Minn.), 37 *Id.* 336, note 341; *Kansas Pac. R. Co. v. Whipple* (Kan.), 37 *Id.* 320, note 329; *Erwin v. St. Louis, I. M. & S. R. Co.* (Mo.), 35 *Id.* 390, note 394.

Injuries to Trespassers—Boy Nine Years of Age—Contributory Negligence.—Where plaintiff in an action, a boy between 9 and 10 years of age, was trespassing upon a railroad and, while walking between the tracks, to avoid some water lying there, stepped upon the ends of the ties and was struck by a car after taking about three steps, he cannot recover. *Mitchell v. Philadelphia, W. & B. R. Co.*, Pa. Sup. Ct., Feb. 3, 1890.

Same—Boy Climbing upon Freight Car.—Where a boy 11 years of age climbs upon a freight car standing upon a side track in a railroad depot, he is a trespasser and cannot recover for injuries sustained through being thrown from the car by the concussion caused by coupling in the absence of evidence showing that the company's employees were aware of his presence. *Louisville & N. R. Co. v. Hurt*, Ky. Ct. App., March 18, 1890.

Same—Boy Riding on Foot-board of Engine—Instructions.—Plaintiff sued to recover damages for injuries received by him while riding upon the foot-board of one of defendant's engines. The court instructed the jury that before finding for the plaintiff they must be satisfied by a preponderance of the evidence, "*First*, That the boy was on the foot-board of the engine; *second*, that the engineer did see him on the foot-board; *third*, that the engineer after seeing the lad upon the foot-board, started the engine without ascertaining whether the lad had gone off; *fourth*, that the engineer was guilty of gross negligence, and *fifth*, that the plaintiff by reason of his insufficient intelligence, was unable to comprehend the danger, and was not guilty of contributory negligence. In order to find for the plaintiff, you will have to find affirmatively upon each and every of those propositions. If you do not so find, your verdict will have to be for the defendant." *Held*, that the plaintiff could not complain of the instructions as they stated the law as favorably as it was entitled to have it stated, if not more favorably. *Hughes v. Detroit, G. H. & M. R. Co.*, Mich. Sup. Ct., Dec. 28, 1889.

Same—Ruling of Court upon Previous Appeal.—Where the question whether the court had upon a former trial acted properly in ruling out plaintiff's evidence as to the condition of the yard in which plaintiff, a boy, was injured while riding on the foot-board of an engine, and the use to which it had been put as a place of pastime by children, was not involved or argued on an appeal from that trial, an intimation by the supreme court on such appeal that the trial court acted properly in ruling out the evidence, does not preclude plaintiff on a subsequent trial from laying the foundation, both in the opening address and in offers of evidence, for a hearing upon

the question in the event of verdict being returned for the defendant. *Hughes v. Detroit, G. H. & M. R. Co.*, Mich. Sup. Ct., Dec. 28, 1889.

Boy Walking on Street Railway Track—Contributory Negligence—Province of Jury.—In an action by a minor for damages for personal injuries, it appeared from the evidence that plaintiff had walked on the street railway track of the defendant for not more than 80 or 90 feet, by the side of a noisy ice cart which might prevent him from hearing a street car approaching from behind: that if at the time of being run over, he was standing still as he himself testified, it had been but for a moment, while if the driver of the ice cart was correct, the boy was still walking along when he was run over; that the driver of the street car was careless; that plaintiff might properly rely somewhat on the driver using greater care than he did, and that there was no reason to expect a car at that time, the car being five minutes late and another not yet due. *Held*, that the question whether plaintiff exercised proper care was for the jury. *Howland v. Union St. R. Co.*, Mass. Sup. Jud. Ct., Nov. 11, 1889.

USHER

v.

WEST JERSEY R. CO.

(126 *Pa. St.* 206.)

Negligently Causing Death—Conflict of Laws—Action by Widow in Foreign State.—Where a person has been killed in a railroad accident in another state, the widow cannot maintain an action in Pennsylvania in her own name, under a statute of such state which confers a right of action for the death, but expressly directs the action to be brought by the administrator though for the ultimate benefit of the widow and next of kin.

Same—Effect of Statute of State where Action is Brought.—The fact that a similar statute of Pennsylvania gives the right to sue expressly and exclusively to the widow, if there be one, for the benefit of herself and her children, does not confer any right upon the widow to maintain the action.

Same—Remedy—Lex Fori.—Where a statute declares that persons negligently causing death shall be liable notwithstanding the death of the injured person, and a subsequent provision confers the right of action only upon the personal representatives of the deceased, the right to bring the action is not merely part of the remedy and governed by the *lex fori*, but is part of the right conferred by the statute, and is governed by the law of the state in which the statute has been enacted.

ERROR to Court of Common Pleas, Philadelphia County.

Action by Josephine Usher against the West Jersey R. Co. to recover damages for negligently causing the death of her husband. Judgment of non-suit was entered, and plaintiff brings error.

John Roberts and *Geo. S. Graham* for plaintiff in error.

David W. Sellers for defendant in error.

MITCHELL, J.—John F. Usher was killed by an accident upon the defendant's road in New Jersey, under circumstances of negligence, as we must assume, for which he would have had an action had he been only injured. But, having been killed, his right of action, under the universal rule of the common law, terminated with his life. If any right of action remained, it must have been wholly based upon statute, and as the occurrence out of which, if at all, the right must arise, took place in New Jersey, it is to the statutes of that state alone that we must resort to ascertain the nature of the right, and the party in whom it is vested.

It is not questioned that the action is transitory, and that it may be sustained in the courts of this state, if jurisdiction be acquired over the defendant. Adverse decisions have been made on this point in several states, but for Pennsylvania it has been settled by this court in *Knight v. West Jersey R. Co.*, 108 Pa. St. 250, 26 Am. & Eng. R. Cas. 485. Comity will enforce rights, not in their nature local, and not contrary to the policy of the government of the tribunal, no matter where arising, and without regard to whether they are of common-law or statutory origin. There is no difference in this respect between such rights, except in the presumption that common-law rights in other states are similar to our own, and the absence of such presumption, and consequent necessity of proof, in regard to rights merely statutory.

Right of action is transitory.

The statute of New Jersey (March 3, 1848, P. L. 151) provides in section 1 "that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." Section 2. "That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate," etc.

Statute of New Jersey.

The present action was brought by the widow of Usher, and we thus have the question presented whether she can

maintain the action in her own name and to her own use.

The question has never been expressly decided in this state, nor, so far as we can learn, elsewhere. It arose directly in *Patton v. Pittsburgh, C. & St. L. R. Co.*, 96 Pa. St. 169, 11 Am. & Eng. R. Cas. 658, and was ruled by the judge at the trial against the plaintiff, who as in the present case was the widow. In this court the judgment was reversed, but upon other grounds. The opinion of the court was, however, indicated very clearly by what was said in regard to the allowance of an amendment making the administratrix plaintiff. "It very clearly appeared there was a mistake in omitting the name of the administratrix of William Patton, deceased, for the statute under which the action was brought directed it should be by and in the name of the personal representative. * * *

This case was tried just as if the legal plaintiff had brought suit, and was upon the record, and the amendment ought to have been allowed. When it was moved, a year had not elapsed from the date of the decedent's death, * * * and, if the trial was free of error, it would have saved the verdict." This court, however, did not mean to pass upon the form of the action, for the obvious reason that the larger question, whether the action could be maintained in this state at all, was the main question attempted to be raised, but which the court held was not in fact raised, because of an imperfect reservation of the point at the trial below, and therefore refused to pass upon it. That main question was subsequently decided in the affirmative in *Knight v. New Jersey R. Co.*, 108 Pa. St. 250, 26 Am. & Eng. R. Cas. 485, but the present question has remained open until now. The passage quoted, however, from the opinion of our late Brother TRUNKEY, is valuable, as showing the inclination of the court at that time.

The case of *Books v. Borough of Danville*, 95 Pa. St. 158, also has some weight as raising the converse of the present question. That was an action by an administrator for the injuries to the decedent, and it was sought to be maintained on the provision of the constitution that the action for such injuries "shall survive." A very eminent judge of the common pleas (ELWELL, P. J.) held, however, that as the constitution permitted the legislature to prescribe for whose benefit the action should be prosecuted, and, as there was no other legislation than the act of 1855, the administrator had no right. The plaintiff was accordingly nonsuited, and this court sustained the judgment, holding that, as the action was purely statutory, it could only be maintained by the party to whom the statute gave it. Nor, as already said, have we found any

direct case upon the point in other states. The general course of decisions bearing collaterally upon it is, however, adverse to sustaining such an action, except by the very one whom the statute names as entitled to bring it. Thus in *Woodard v. Michigan So. & N. I. R. Co.*, 10 Ohio St. 121, it was held that an administrator appointed in Ohio could not maintain an action in Ohio for a death caused by negligence in Illinois, although it was proved that the statutes of both states were alike, and gave such an action to the administrator. The court held that the Illinois statute gave the action only to the Illinois administrator, and that while the Ohio administrator had a right of action by the Ohio statute for causes arising in that state, yet that statute could not support an action for causes arising in Illinois. *Woodard v. Michigan So. & N. I. R. Co.* was approved and followed by the supreme court of Massachusetts in *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, upon the same grounds; the only difference being that in the latter case it did not appear that there was any law of Massachusetts giving an action under similar circumstances. A broader view of the statute was, however, taken in *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, and *Dennick v. Central R. Co. of New Jersey*, 103 U. S. 21, 1 Am. & Eng. R. Cas. 309, where it was held that the statutes, though not having any extraterritorial force, would be recognized by comity, and that as they give an action to the personal representative generally, without limitation as to the authority under which he is appointed, an administrator of the home jurisdiction can maintain the action, even for causes arising in another state, upon proof of the laws of such state authorizing the action. With these latter decisions accords our own case of *Knight v. West Jersey R. Co.*, already cited. But none of the cases raise or discuss the question involved here, whether the widow can maintain an action in her own name, under a foreign statute, which expressly directs the action to be brought by the administrator, though for the ultimate benefit of the widow and next of kin. We are thus left to discuss the question upon general principles.

At the outset we may say that the action can get no support from the fact that a closely similar statute in this state gives the right to sue, expressly and exclusively, to the widow, if there be one, for the benefit of herself and her children. It is not seriously claimed that our statute has any extraterritorial force which can produce rights from occurrences in New Jersey. On this point all the authorities agree. *Whitford v. Panama R. Co.*, 23 N. Y. 484; *Woodard v. Michigan So. & N. I. R. Co.*,

Effect of Penn-
sylvania stat-
ute.

10 Ohio St. 121; Richardson v. New York Cent. R. Co., 98 Mass. 85; State v. Pittsburgh, etc., R. Co., 45 Md. 41; Railroad Co. v. Lacy, 43 Ga. 461; Anderson v. Milwaukee & St. P. R. Co., 37 Wis. 321; McCarthy v. Chicago, R. I. & P. R. Co., 18 Kan. 46.

The language of the New Jersey statute is that "every such action shall be brought by and in the names of the personal representatives of such deceased person." As this language is entirely clear, unqualified, and peremptory, it would seem to settle the question without more. But it is sought to escape this conclusion by insisting—*First*, that, as the amount recovered in such action is to be for the exclusive benefit of the widow and next of kin, the widow may be allowed to sue for it in her own name: and, *secondly*, that the second section concerns only the remedy, and therefore may be disregarded by the courts of Pennsylvania, who may administer the rights of the *lex loci* under the procedure of the *lex fori*. I believe however, that a brief consideration will show that neither of these grounds is tenable. As to the first, there is no room for latitude of construction. The meaning of the language used is plain and unambiguous, and its directions mandatory. It is an established rule that statutory remedies are to be strictly pursued, and we have no right, when the legislature have commanded one form, to say that another will serve the purpose equally as well. The law making power has settled the remedy as well as the right, and courts are not authorized to vary or depart from either. Moreover, the distinction made in this statute between the party having the right of action and the ultimate beneficiary is familiar to all common-law states, and is of settled importance, especially in those where as in New Jersey, the administration of law and equity is not only in separate forms, but by separate tribunals. In the face of this settled distinction, clearly recognized and commanded by the statute, it would be an act of judicial usurpation to say that the mandate of the statute may be disregarded. In this connection the language of our Brother GREEN in Books v. Borough of Danville, 95 Pa. St. 166, is very strong and pertinent. "No other persons have been clothed with the right, and hence no other persons can sustain such actions. The present action is brought by an administrator to recover damages for injuries resulting in the death of the intestate. But the legislature has not declared that such a person may maintain such an action, and hence the right to do so does not exist."

But, secondly, is the question of the party who may sue merely a question of the remedy, and therefore determinable

Statutory
remedies must
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construed.

by the law of the forum? Undoubtedly there are cases where it is so. Whether an infant shall sue by guardian or by next friend, and whether an assignee shall sue in his own name or that of his assignor, and the like, are clearly questions of procedure only. But where the matter is not of form, merely, but of right, the remedy must follow the law of the right. The second section of the statute in question cannot be disregarded or separated from the first. They are as closely interwoven and as necessary to each other as if they were parts of the same section. This is plain from the most cursory examination. The first section confers no right of any kind or on anybody. It merely imposes a liability. The second section confers the right, and without it the first would be utterly nugatory and ineffective. Apart, the first gives no right, the second imposes no liability. Together, they give the liability, the right, the party to enforce the right, and the party entitled to the benefit; and they give all these together, by plain words which constitute one grant, to wit, an action, to be enforced as given, and not capable of being split up into different rights, with varying remedies, according to the tribunals in which they may chance to be asserted.

Remedy—Lex
fori.

If this result were at all doubtful on principle, there is another consideration of controlling weight. It is unquestionable that in New Jersey the personal representative alone can sue, and it is equally clear that he can maintain his action there, notwithstanding this action, or any other, brought by another party, in another jurisdiction. It would be a strange perversion, not only of comity, but of justice, to entertain an action here, which would either oust the right of the legal party in the place where the cause of action arose, or subject the defendant to as many separate recoveries as parties could be found who might be entitled, under the laws of different forums, to bring actions under similar circumstances. Nor is the argument helped by the suggestion that as the action by the personal representative is only a means to an end, *i. e.*, the benefit of the parties ultimately entitled to the damages, the court can control the disposition of the verdict, so as to administer the rights of all parties according to the law of New Jersey. Why should our courts undertake such an unnecessary task, in the face of a direct prohibition by the law of New Jersey? The administration of the law of another jurisdiction is never desirable, and, at best, is full of difficulties and uncertainties. It is assumed *ex necessitate*, when assumed at all, and it would surely be pushing comity beyond its legitimate bounds to assume to do for the tribunals of New Jersey what they certainly would

Comity.

not do for themselves—administer the right of one party through a suit brought by another.

Before closing I may say that the statute of New Jersey, as of most of the other States, is an almost literal transcript, as far as it goes, of 9 & 10 Vict. chap. 93, commonly known as "Lord Campbell's Act." I have examined the English digests without finding any case bearing upon this question, but it may be noted, as some indication of the view taken of that act, that a possible inconvenience, such as is alleged in this case, has been provided for by the 27 & 28 Vict. chap. 95, § 1, which enacts that if there shall be no executor or administrator, or, there being such, he shall fail to bring suit for the space of six months after the death, then such action may be brought by and in the name of all the persons for whose benefit the action by the executor would have been. This is certainly a strong indication of the understanding that nothing but a statute could authorize an action in the name of any one but the personal representative to whom the right was given in the first instance. The learned judge was right in entering a nonsuit, and the judgment is affirmed.

Actions for Wrongful Death—Conflict of Laws—Statutes have no Extraterritorial Effect.—The right of action for the death of a person caused by the wrongful act of another, is purely statutory, and statutes conferring this right have no extraterritorial effect. Accordingly, where the death occurred in another state, the rights and liabilities of the parties are governed by the laws of that state, and not by the laws of the state where suit is brought. *Armstrong v. Beadle*, 5 Sawy. (U. S.), 484; *Shedd v. Moran*, 10 Ill. App. 618; *Buckles v. Ellers*, 72 Ind. 220; *Hyde v. Wabash*, St. L. & P. R. Co. (Iowa), 15 Am. & Eng. R. Cas. 503; *McCarthy v. Chicago*, R. I. & P. R. Co., 18 Kan. 46; *State v. Pittsburgh & C. R. Co.*, 45 Md. 41; *McMasters v. Illinois Cent. R. Co.* (Miss.), *ante*, p. 486; *Chicago, St. L. & N. O. R. Co. v. Doyle* (Miss.), 8 Am. & Eng. R. Cas. 178; *Vawter v. Missouri Pac. R. Co.* (Mo.), 19 Am. & Eng. R. Cas. 176; *Whitford v. Panama R. Co.*, 23 N. Y. 465, aff'g 3 Bosw. (N. Y.), 67; *Vanderwerken v. New York & N. H. R. Co.*, 6 Abb. Pr. (N. Y.), 239; *Beach v. Bay State Steamboat Co.*, 30 Barb. (N. Y.), 433, rev'g 27 Barb. (N. Y.), 248; *Crowley v. Panama R. Co.*, 30 Barb. (N. Y.), 99; *Vandeventer v. New York & N. H. R. Co.*, 27 Barb. (N. Y.), 244; *Stallknecht v. Pennsylvania R. Co.*, 53 How. Pr. (N. Y.), 305; *Hover v. Pennsylvania R. Co.*, 25 Ohio St. 667; *Nashville & C. R. Co. v. Eakin*, 6 Coldw. (Tenn.), 582; *Phillips v. Eyre*, L. R., 4 Q. B. 225, aff'd L. R., 6 Q. B. 1. And it has been held in England that where the injury for which suit was brought was sustained in a colony, an act of the colonial legislature, rendering legal the wrongful act done subsequently passed before an action had been brought in England, took away the right of action not only in the courts of the colony, but also in those of England. *Phillips v. Eyre*, L. R., 4 Q. B. 225, aff'd L. R., 6 Q. B. 1. Therefore, where the cause of action does not survive by the laws of the state where it accrued, no recovery can be had in another state upon a statute thereof. *Willis v. Missouri Pac. R. Co.* (Tex.), 23 Am. & Eng. R. Cas. 379; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294. And the fact that the de-

defendant is a corporation created by the state where the action was brought, for the purpose of constructing and operating a railroad in the foreign state or country where the plaintiff's intestate was killed, does not have the effect of creating a cause of action under the statute of the state where the suit is brought. *Whitford v. Panama R. Co.*, 23 N. Y. 465.

Where the death was caused on the high seas on board a vessel hailing from, and registered in, a port within the state where the action is brought, and owned by citizens thereof, the person whose death was so caused being also a citizen of the state, the vessel being at the time employed by the owners in their own business and their negligence being alleged to have caused the death, the cause of action is deemed to have arisen within the state, and therefore to be governed by its laws. *McDonald v. Mallory*, 77 N. Y. 546. This case must be considered to overrule *Mahler v. Norwich & N. Y. Transp. Co.*, 35 N. Y. 352, in which it was held that an action cannot be maintained by an administrator under the statutes, when the death of the intestate and the negligence causing it, occurred in the open seas beyond the territorial limits of the state, upon a vessel owned therein and during a voyage between two ports, both within the state.

Same—Suits in Sister State under Statute of State where Accident Occurred.—Actions to recover damages for death caused by the wrongful act, neglect, or default of another, are transitory in their nature. *Dennick v. Central R. Co. (U. S.)*, 1 Am. & Eng. R. Cas. 309; *Shedd v. Moran*, 10 Ill. App. 618; *Cincinnati, H. & D. R. Co. v. McMullen (Ind.)*, 38 Am. & Eng. R. Cas. 165. But if enforced in a foreign state it can only be by comity, by a remedy according to the procedure of the state where suit is brought. *Vawter v. Missouri Pac. R. Co. (Mo.)*, 19 Am. & Eng. R. Cas. 176; *Knight v. West Jersey R. Co. (Pa.)*, 26 *Id.* 485.

But whenever the right of action has become fixed and a legal liability incurred, that liability may be enforced and a right of action pursued in any court which has jurisdiction of the parties. *Boyce v. Wabash R. Co. (Iowa)*, 23 Am. & Eng. R. Cas. 172; *Dennick v. Central R. Co. (U. S.)*, 1 *Id.* 309. See also *Central R. Co. v. Swint (Ga.)*, 26 Am. & Eng. R. Cas. 482; *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.), 341. But in *Willis v. Missouri Pac. R. Co. (Tex.)*, 23 Am. & Eng. R. Cas. 379, WILLIE, C. J., said that where the right of action does not exist except by reason of statute, it can be enforced only in the state where the statute is in existence and where the injury has occurred, that is to say, the cause of action must have arisen and the remedy must be pursued in the same state, and that must be the state where the law was enacted and has effect. In the subsequent case of *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, the court declared that it would neither formally adopt nor recede from the *dictum* of the chief justice in *Willis's* case. In *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177, it was said that the law creating a right of action against a railroad company for causing the death of a person by wrongful act or negligence, is purely local to the state in which the right is created, although it may be otherwise in causes of action under the statute in cases of individuals. Corporations being local to the state which creates them, the right of action against them must be local to the same state, and cannot be enforced beyond its territorial jurisdiction. It would appear, however, that the consideration of the point was not necessary to the decision of the case, and it is certainly against the great weight of authority.

Same—Penal Actions.—In some cases *dicta* are to be found to the effect that statutes conferring a right of action for death caused by wrongful act or neglect are penal, and therefore will not be enforced in other jurisdictions. Thus in *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, the court after referring to the rule of law that a penal statute cannot be enforced beyond the territory in and for which it was enacted, and after pointing out that

the cause of action conferred by the New York statute was not for compensation for the injury to deceased's estate, but that the compensation belonged to his widow and children, said: "If we understand that the limitation of the defendants' responsibility to cases in which the deceased would have had a right of action if he had survived, is not intended to make his right of action survive to his representatives, but is only meant to define and describe the cases in which the right of property and of action is recognized in the widow or next of kin, we have still the question to meet. How can that be regarded as anything else than a statute penalty, which the personal representative of the deceased is to recover by an action; which is limited in amount, although that amount may be much less than the extent of the injury sustained by those whose loss is to be estimated in computing it; and which is to be distributed among the parties entitled to receive it, not in proportion to the injuries which they have respectively sustained, but in proportion to the shares to which they would be severally entitled in the distribution of an intestate estate? We do not readily find a satisfactory answer to this question." The court, however, did not decide the case upon this ground. This *dictum* was quoted with approval in *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46, 49. But in *Shedd v. Moran*, 10 Ill. App. 618, the court held that such statutes are not to be deemed penal in their nature, nor to be regarded as a part of the police regulations of the state which enacts them.

In *Bettys v. Milwaukee & St. P. R. Co.*, 37 Wis. 323, it was held that double damages for stock killing are by way of penalty, and the liability therefor, cannot be enforced by suit in a state other than that in which the cattle were killed. But in *Boyce v. Wabash R. Co.* (Iowa), 23 Am. & Eng. R. Cas. 172, the court held that an action will lie in Iowa to recover double damages allowed by the statutes of Illinois for the killing of a mule therein, it appearing that the statutes accord with the statutes and policy of the state of Iowa, and that it made no difference even if it were conceded that the statute in question was enacted by virtue of the police power of the state of Illinois.

Same—Existence of Similar Statute in State Where Suit Brought Essential.

—In the greater number of decisions, the right to recover for the wrongful death of a person in a foreign state by virtue of a statute thereof, is conditioned upon the existence of a similar statute in the state in which suit is brought. See *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169; *Cincinnati, H. & D. R. Co. v. McMullen* (Ind.), 38 Am. & Eng. R. Cas. 165; *Morris v. Chicago, R. I. & P. R. Co.* (Iowa), 19 *Id.* 180; *Bruce's Adm'r v. Cincinnati R. Co.*, 83 Ky. 174; *Davis v. New York & N. E. R. Co.* (Mass.), 28 Am. & Eng. R. Cas. 223; *Wawter v. Missouri Pac. R. Co.* (Mo.), 19 *Id.* 176; *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Stallknecht v. Pennsylvania R. Co.*, 53 How. Pr. (N. Y.), 305; *Knight v. West Jersey R. Co.* (Pa.), 26 Am. & Eng. R. Cas. 485; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660. But in some cases it has been held that it is sufficient that the cause of action is not contrary to the policy of the state where the suit is brought, and that the existence of a similar statute is only evidence that the action may be maintained without violating any rule of policy. *Shedd v. Moran*, 10 Ill. App. 618; *Chicago, St. L. & N. O. R. Co. v. Doyle* (Miss.), 8 Am. & Eng. R. Cas. 171. And it has even been held that the right of action created by the statute of one state may be enforced in another independently of any statutory provision in the latter state, provided it be not in conflict with the public policy of the state in which it is sought to enforce it. *Chicago, St. L. & N. O. R. Co. v. Doyle* (Miss.), 8 Am. & Eng. R. Cas. 171. And in *Herrick v. Minneapolis & St. L. R. Co.* (Minn.), 11 Am. & Eng. R. Cas. 256, it was held that it is not necessary that the law of the state where the right

of action accrued and the law of the state where it is sought to be enforced, should concur in giving a right of action. Accordingly, the court declared that a statute making railroad companies liable for damages sustained by employes in consequence of the negligence of co-employes, when such wrongs are connected with the use and operation of any railroad, on or about which they shall be employed, is not against the public policy of the laws of Minnesota, although different from the common rule which is retained in that state, and that an action might be maintained.

In the jurisdictions where it is deemed essential that similar statutes should exist, it has been held to be sufficient if the statutes are of similar import and character, and that it is not necessary that they should be precisely the same. *Morris v. Chicago, R. I. & P. R. Co.* (Iowa), 19 Am. & Eng. R. Cas. 180; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48. But the existence of a similar statute in another state will not be presumed; it must be proved. *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46, 49; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48. And where it is material to determine whether the statute of the state where the accident occurred, and the statute enforced in the state where suit is brought are substantially the same, the question is for the court. *Patton v. Pittsburgh, C. & St. L. R. Co.* (Pa.), 11 Am. & Eng. R. Cas. 658.

A statute of one state by which a right of action for personal injuries survives, will not be enforced by the courts of a state in which the common law by which such cause of action dies with the person, is unchanged. *Texas & P. R. Co. v. Richards*, 68 Tex. 375. See also *Anderson v. Milwaukee & St. P. R. Co.*, 37 Wis. 321; *Bettys v. Milwaukee & St. P. R. Co.*, 37 Wis. 323.

Where the statute of the state in which the injuries causing the death were sustained, confers the right of action upon the husband, wife or children of the deceased, and the statute of the state where the action is brought confers the right of action upon the personal representative, such a dissimilarity exists as prevents an administrator appointed in the latter state from maintaining the action. *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46. But in this case, the court declared that it did not pass upon the question whether an administrator appointed under the laws of another state, having similar provisions of law to those imposed in Kansas, might or might not maintain an action in Kansas for the purpose of recovering a fund to be distributed under the laws of the state whence he derives his appointment. If, however, the right of action is conferred upon the same person in both states, viz.: the personal representative, but the statute of the state where the accident occurred limits the amount recoverable, while no such limitation is placed by the statute of the state where suit is brought, and the statute of the former state also provides that the recovery shall be for the exclusive benefit of the widow and next of kin, while in the latter state the recovery shall be disposed as other personal estate, except that it shall not be liable for the payment of debts, if the deceased leaves a husband, wife, child or parent, the dissimilarity is not so great as to preclude an action being maintained in the latter state, the distribution being to the same persons in both states. *Morris v. Chicago, R. I. & P. R. Co.* (Iowa), 19 Am. & Eng. R. Cas. 180. But a contrary view has been adopted in Texas and it has been held that when by the statute of the state where the death occurred, damages recovered are distributed as personal assets of the deceased, and in the state where the suit is brought they are divided among the persons named in the statute in such proportion as the jury shall determine, the statutes are so dissimilar that the action will not be entertained under the rule of interstate comity. *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660.

The statute of Missouri expressly prohibits the prosecution by an admin-

istrator of a civil action to the person of the intestate. Therefore an administrator appointed in Missouri will not be permitted to sue in Missouri under a Kansas statute for the death of the intestate in Kansas, although the Kansas statute provides that the right of action shall accrue to the personal representative. *Vawter v. Missouri Pac. R. Co.* (Mo.), 19 Am. & Eng. R. Cas. 176. Conversely, an administrator appointed in Missouri cannot maintain an action in Kansas under the Kansas statute, authorizing personal representatives to bring an action for damages for wrongfully causing the death of the intestate, when the law of Missouri prohibits him from instituting such an action in his own state. *Limekiller v. Hannibal & St. J. R. Co.* (Kan.), 19 Am. & Eng. R. Cas. 184.

Under the Massachusetts statute, an action cannot be maintained in Massachusetts by an administrator against a railroad operating a continuous line in Massachusetts and Connecticut, for injuries received by the intestate through the negligence of the defendant while the intestate was travelling over its road in Connecticut, where the statutes of the latter state do not provide for the survival of such action, and especially when the statutes of that state provide for the indictment of the railroad company in such cases, and for a fine which is for the benefit of certain relatives of the deceased. *Davis v. New York & N. E. R. Co.* (Mass.), 28 Am. & Eng. R. Cas. 223.

Same—Proof of Foreign Statute—Presumption of Law.—In the absence of proof to the contrary, it will be presumed that the rule of the common law that a cause of action for personal injuries dies with the person injured, prevails in another state. *State v. Pittsburgh & C. R. Co.*, 45 Md. 41. It will not be presumed that a statute exists in another state or country conferring the right to bring an action for wrongful death. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Knight v. West Jersey R. Co.* (Pa.), 26 Am. & Eng. R. Cas. 485. And it is not necessary for the defendant to allege in its answer that the death occurred in another state, and that there was no statute there authorizing a maintenance of the action. *Debevoise v. New York, L. E. & W. R. Co.* (N. Y.), 25 Am. & Eng. R. Cas. 335. The plaintiff must both allege and prove the existence of the statute of the foreign state conferring the cause of action. *Debevoise v. New York, L. E. & W. R. Co.* (N. Y.), 25 Am. & Eng. R. Cas. 335; *Vanderwerken v. New York & N. H. R. Co.*, 6 Abb. Pr. (N. Y.), 239; *Vandeventer v. New York & N. H. R. Co.*, 27 Barb. (N. Y.), 244; *Selma, R. & D. R. Co. v. Lacy*, 49 Ga. 106.

Statutes conferring a right of action for the death of a person do not transfer the right of action from the deceased to his representative, but give a totally new right of action, and the fact that the deceased might have maintained an action in one state upon the presumption that the common law of the state where he was injured, was similar to the law of the state where suit is brought, does not authorize his administrator to maintain a suit. *Whitford v. Panama R. Co.*, 23 N. Y. 465, 469. DENIO, J., said: "It may well be that if King had survived his injuries, he could have sustained an action against the defendants in the courts of this state, grounded on the presumption that the laws of New Grenada coincide with the rules of the common law in respect to injuries to the person arising from the negligence of another. But the suggestion that the present action is brought to enforce the right which the common law gave to the deceased, and that the provisions of our statute should be considered as affecting only the remedy which may always be regulated by the *lex fori*, is not in my opinion, sound; for it is not a simple devolution of a cause of action which the deceased would have had which the statute affects, but it is an entirely new cause of action which is here sought to be enforced. The system of the statute as well as of the common law is, that the right of action for damages on account of his bodily injuries, which belonged to the

deceased while he lived, was extinguished by his death. The statute does not profess to revive his cause of action in favor of the executor or administrator. The compensation for the bodily injuries remains extinct, but a new grievance of a distinct nature, viz; the deprivation suffered by the wife and children, or other relatives, of their natural support and protection, arises upon his death and is made by the statute the subject of a new cause of action, in favor of these surviving relatives, but to be prosecuted in point of form by the executor or administrator."

Same—Who may Maintain Action.—The right of the plaintiff to recover in the action, is to be determined by the statute of the state where the accident occurred. Thus, when by the place of the accident, the personal representative of the deceased is entitled to maintain the action, no other person, not even the widow in her name as widow, can bring it in another state. *Selma, R. & D. R. Co. v. Lacy*, 49 Ga. 106. And when the right of action is in the personal representative for the use of the wife and children, the wife cannot sue alone, even assuming that a suit might be brought by the beneficiaries and not by the administrator as trustee. *Western & A. R. Co. v. Strong*, 52 Ga. 461. The pleadings must set out that the plaintiff has a cause of action in the place where the deceased was killed. *Hamilton v. Hannibal & St. J. R. Co.*, 39 Kan. 56.

In Illinois, a foreign administrator may bring suit for the death of his decedent in an action within the state; *Wabash, St. L. & P. R. Co. v. Shacklet* (Ill.), 12 Am. & Eng. R. Cas. 166; and in Kansas, a foreign administrator may maintain an action for damages for the death of his intestate, the provision of the Kansas statute not being in terms limited to the administrators appointed in that state. *Kansas Pac. R. Co. v. Cutter*, 16 Kan. 568.

Where an action is brought for wrongful death caused by an accident in another state, it will be presumed on the petition in the absence of definite allegations, that the plaintiff was appointed administrator in the state where the action is brought. *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46, 50.

An indictment against a common carrier of passengers, for the loss by his negligence of the life of a passenger under the Massachusetts statute which gives the fine to the use of the passenger's executor or administrator for the benefit of his widow and heirs, must allege that administration has been taken out in the commonwealth. *Com. v. Sandford*, 12 Gray (Mass.), 174.

There is a conflict in the decisions concerning the right of an administrator appointed in the state where the action is brought to maintain an action under a foreign statute. In Massachusetts, Ohio and Kansas, it has been held that he has no authority to maintain such an action; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *Woodard v. Michigan, S. & N. I. R. Co.*, 10 Ohio St. 121; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46; and a similar decision was rendered by SHIPMAN, J., of the United States Circuit Court for the Southern District of New York. *Mackay v. Central R. of New Jersey*, 14 Blatchf. (C. C.) 65, 4 Fed. Rep. 617.

In *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, the court declared that the only construction, which the New York statute conferring a right of action upon the administrator was capable of was that it conferred certain new and peculiar powers upon the personal representative in New York, and held therefore, that the right of action which the New York statute gave to the personal representative of the deceased in that state was not a right of property passing as assets of the deceased, but was a specific power to sue created by the New York local law, which did not pass to an administratrix appointed in Massachusetts. The decision in *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46, 51, was based upon the reasoning that it would not be presumed that the laws of the state

where the accident occurred gave an administrator appointed in the state where the action was brought, power to collect moneys under them, to administer trusts imposed by them, and to distribute funds among the proper parties to whom the same belonged by the statutes conferring the cause of action. The decision in *Mackay v. Cent. R. of New Jersey*, 14 Blatchf. (C. C.) 65, 4 Fed. Rep. 617, was placed upon the ground that an administrator appointed by the statutes of a state, has only such rights and powers as the statutes of the state in which he was appointed conferred upon him, and these rights and powers cannot be extended by the statutes of another state. In *Woodard v. Michigan, S. & N. I. R. Co.*, 10 Ohio St. 121, the court held that because a statute of Illinois conferred a right of action and imposed a trust on the administrator under the laws of that state, an administrator appointed and acting under the laws of Ohio was not thereby authorized to bring that action and perform that trust, but it expressly declared that it did not undertake to decide whether an administrator appointed under the laws of Illinois might or might not maintain such an action for the purpose of recovering the fund to be distributed under the laws of Illinois.

In other decisions, the right of an administrator appointed in the state where the action is brought to maintain it, has been sustained. *Dennick v. Central R. Co.* (U. S.), 1 Am. & Eng. R. Cas. 309; *Morris v. Chicago, R. I. & P. R. Co.* (Iowa), 19 *Id.* 180; *Bruce's Adm'r v. Cincinnati R. Co.*, 83 Ky. 174, (overruling *Taylor's Adm'r v. Pennsylvania Co.* (Ky.), 7 Am. & Eng. R. Cas. 23;) *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48. These decisions are placed upon the ground that where a statute provides that "every such action shall be brought by and in the name of the personal representative of such deceased person," the right conferred is enforceable by the administrator, no matter where he was appointed, and not only by a personal representative appointed in the state enacting the statute and amenable to its jurisdiction. The distribution of the money recovered by the administrator will, under such circumstances, be enforced by the courts of the state where the action is brought according to the law of the state where the accident occurred. *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848.

When the statute of the state where the accident occurred vests the right of action solely in the surviving consort, children, etc., an administrator of that state has no standing in the courts of another state to maintain an action under the statute of the state where the suit is brought conferring a right of action on the personal representative. *Hulbert v. Topeka*, 34 Fed. Rep. 510.

Upon a homicide by a railroad company of Georgia upon a line owned and controlled by it in Alabama, the administrator of the deceased in Alabama for the use of the widow and children, could bring suit in Georgia by complying with the statutory requirements thereof, and thus having his appointment *quoad hoc* ratified in Georgia, but not otherwise; and if an administrator of the deceased be appointed in Georgia, he may bring the suit for like uses. *Central R. Co. v. Swint* (Ga.), 26 Am. & Eng. R. Cas. 482. See also *South Carolina R. Co. v. Nix*, 68 Ga. 572.

A foreign administrator can maintain an action within a state under a statute thereof, against a defendant for having wrongfully caused the death of a person. *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 49. The court, in this case, construed the statute of Indiana to confer the right of action upon the administrator of the deceased, whether such administrator was appointed in Indiana or in any other state, and declared that there was no presumption that because, by common law, the distribution of the decedent's estate was governed by the law of the residence of the decedent at the time of his death, the legislature must have intended that the distribution should be enforced within the state.

Same—Appointment of Administrator—Jurisdiction of Court.—In Iowa, it has been held that an administrator may be appointed for the sole purpose of bringing an action to recover damages for the death of his decedent, caused by the negligence of a railroad company in another state. *Morris v. Chicago, R. I. & P. R. Co.* (Iowa.), 19 Am. & Eng. R. Cas. 180. And a similar rule has been adopted in Nebraska. *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848. But in Illinois *Cent. R. Co. v. Cragin*, 71 Ill. 177, it was held that the right of action created by the Illinois statute in favor of the administrator of a person whose death was caused by the wrongful act or neglect of a railroad company in Illinois, could not be regarded as property in the state of Iowa when the courts of such state had no jurisdiction of the defendant, and when, according to the reasoning of the Illinois court, no right of action therefor existed in Iowa, and that the Iowa courts therefore had not jurisdiction to grant letters of administration upon the estate of the deceased.

When the statute regulating the appointment of administrators requires that the deceased should have left an "estate" within the county, the "estate" in such case embraces only assets of the intestate, *i. e.*, property rights or choses in action belonging to him at the time of his death which are subject to be applied by the administrator to the payment of debts. It does not include a claim for damages for causing the death of the intestate, which cannot be applied for that purpose. *Perry v. St. Joseph & W. R. Co.* (Kan.), 11 Am. & Eng. R. Cas. 663. Similarly the term "assets" as used in a statute regulating the appointment of administrators, means assets of the intestate, and does not include a claim for damages for his death which is enforceable by the administrator for the benefit of the widow and children, or the next of kin of the deceased. *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477.

When an administrator has been appointed in the court where the deceased was domiciled, he is entitled as a matter of right to ancillary administration in the state where the deceased was killed for the purpose of prosecuting a suit for his intestate's death, and it is sufficient if the probate court in granting such administration is satisfied that there is an apparent claim and an honest *bona fide* intention to pursue it. *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213.

A railroad company, against whom an action is being prosecuted by an administrator to recover damages for an injury causing the death of the intestate, has such an interest as to make it a competent party to the petition to the court for a revocation of the letters of administration. *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477.

Action for Wrongful Death—Jurisdiction.—The provision of the Kentucky Civil Code, § 73, that "an action against a common carrier whether of a corporation or not, upon a contract to carry property must be brought in the county in which the defendant, or either of several defendants reside, or in which the contract is made, or in which the carrier agrees to deliver the property;" and that "an action against such carrier for an injury to a passenger or to other persons, or his property, must be brought in the county in which the defendant or either of several defendants reside, or in which the plaintiff or his property is injured, or in which he resides, if he reside in a county in which the carrier passes," does not confer jurisdiction upon the circuit court of a county in which neither the plaintiff nor the defendant, or its chief officer resides, and in which the killing for which the action is brought did not occur. *Sherrell v. Chesapeake, O. & S. W. R. Co.*, Ky. Ct. App., Nov. 14, 1889.

STONE

v.

PENNSYLVANIA R. CO.

(Pennsylvania Supreme Court, February 3, 1890.)

Personal Injuries—Person Engaged on or about Railroad—Construction of Statute.—Plaintiff's employers were owners of a private side track running into their yard from the tracks of the defendant. It was part of plaintiff's duty to separate the cars of the railroad company so that a path across the track might be used by other employees. While engaged in uncoupling the cars upon the track for the purpose of separating them, plaintiff was injured through an engine belonging to the defendant being backed against the cars. *Held*, that plaintiff could not recover, being within the provisions of the Pennsylvania Act of April 4, 1868, § 1, which provides that whenever any person shall be injured "while lawfully engaged or employed" on or about the road, cars or premises of a railroad company of which he is not an employee, the right of action in all such cases against the company shall be such as would exist if such person were an employee.

APPEAL from Court of Common Pleas, Philadelphia County.

Action by William Stone against the Pennsylvania R. Co. for damages for personal injuries. Plaintiff's employer, the Atlantic Refining Co., owned a side track which ran into its yard from the track of the defendant. Plaintiff was charged with the duty of keeping the men in the yard employed and seeing that staves were carried into his employer's barrel factory for the coopers therein. The side track ran between the stove pile and the barrel factory, and there was a path across it for wheeling the staves from the pile to the factory. This path was properly boarded over where it crossed the track. The staves were brought into the yard in defendant's cars which were backed on the side track by its employees. Sometimes defendant's employees separated the cars so as to leave the path free for passage. If they did not do so, it was plaintiff's duty to have it done and pinch bars were kept by the refining company for the purpose. On the day of the accident five cars had been backed in upon the side track and obstructed the path. The conductor refused to separate the cars, and plaintiff called upon his men to get the pinch bars and do so, that he might open the path. Plaintiff went between the cars to uncouple them. The engine had previously been uncoupled, and had been drawn away from the rest of the cars about a car's length. While plaintiff was between the cars the engineer, upon a signal from the conductor, backed the engine down, forcing the cars together, and crushed

plaintiff's arm. The trial court instructed the jury to return a verdict for the defendant, the plaintiff being within the operation of the Pennsylvania statute of April 4, 1868, § 1 (P. L. 58), which provides that when any person shall be injured "while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action and recovery in all cases against the company shall be such only as would exist if such person were an employe."

Alex. Simpson Jr., and Maxwell Stevenson for appellant.
John Hampton Barnes and Geo. Tucker Bispham for appellee.

PER CURIAM.—The jury in this case rendered a verdict for the defendants under a binding instruction from the court below. We are of opinion such instruction was proper. There were no disputed facts. The question was whether the plaintiff came within the act of 1868. This was a question of law for the court. It appears from the plaintiff's own testimony that he was injured in doing an act about the cars of the defendant company which was clearly within the line of his duty. The case comes directly within the authority of *Mulherrin v. Delaware, L & W. R. Co.*, 81 Pa. St. 366; *Cummings v. Pittsburgh C. & St. L. R. Co.*, 92 Pa. St. 82, 4 Am. & Eng. R. Cas. 524; *Baltimore & O. R. Co. v. Colvin*, 118 Pa. St. 230, 32 Am. & Eng. R. Cas. 160. It was urged, however, that the case is upon all fours with *Richter v. Pennsylvania Co.*, 104 Pa. St. 511. We do not so regard it. On the contrary, the distinction between that case and those above cited is marked. *Richter v. Pennsylvania Co.* was decided upon the ground that the plaintiff, at the time he was killed, was not engaged or employed in any business connected with the railroad, but was merely attempting to exercise his right to cross the same. Judgment affirmed.

Construction of Pennsylvania Statute—Person Engaged About Cars or Railroad of Company of Which He is Not an Employe.—See note, 31 Am. & Eng. R. Cas. 319; *Pennsylvania R. Co. v. Price* (Pa.), 1 *Id.* 234, note 239, s. c., (U. S.) 18 *Id.* 273.

Plaintiff
within Penn-
sylvania act
of 1868.

McAdoo

v.

RICHMOND & DANVILLE R. CO.

(*North Carolina Supreme Court, March 17, 1890.*)

Pleading—"Gross" Negligence—Essentials of Plea.—Where a complaint alleges that plaintiff was injured through the gross negligence of defendant's engineer and fireman, but does not allege that the engineer or fireman inflicted the injury willfully, wantonly, or through malice, the word "gross" must be treated as a mere expletive and the use of it as characterizing the negligence alleged makes no material difference in the meaning of the complaint.

Same—Finding of Jury—Effect.—When the complaint is so framed and the jury found specially that the plaintiff was injured "as alleged," the finding must be treated as an affirmative response to an issue involving the question whether the defendant failed to exercise ordinary care in the management of the engine, and thereby injured the plaintiff.

Contributory Negligence—Licensees Walking on Track—Duty to Keep Look-out.—Although a person walking upon a railroad track is not a trespasser, but is using the track by virtue of a license by the company, he is bound to exercise ordinary care to avoid injury, and he has no right of action for injuries caused through his failure to keep a look-out for approaching trains, especially when the train which caused the injury was only moving at the rate of five miles an hour.

THIS was a civil action, tried at the February term, 1889, of the Superior Court of Guilford County, before BYNUM, J.

The second paragraph of the complaint was as follows: "That on the said 17th day of February, 1886, the plaintiff, coming from his usual place of business, was walking upon the track of the defendant's North Carolina Division, as he has been in the habit of doing for several years without objection from the defendant, within the corporate limits of the city of Greensborough, where, owing to the gross negligence of the defendant's servants, he was struck from behind by a locomotive engine belonging to the defendant and operated by its agent, and was violently thrown from the track; that he was thereby much injured, and suffered great physical and mental pain, by having his leg badly strained and bruised whereby he was temporarily disabled from carrying on his former business as a watchman and laborer, and still suffers great pain and inconvenience." This was denied by defendant. The issues submitted, with the responses of the jury, were as follows: "Was the plaintiff injured by the negligence of the defendant, as alleged? *Answer.* Yes. Did the plaintiff contribute to his injury by his own negligence? *A.* Yes.

What damage is the plaintiff entitled to recover? No answer." The words "as alleged," in the first issue, were inserted by the court on motion of the defendant.

Plaintiff testified that on Wednesday of February court, 1886, he was watchman at Seargeant's foundry, and was coming up the track of the railroad, about 8 o'clock A. M., when he was struck from behind by an engine, and knocked off the track. He was struck on calf of leg; skin slightly broken; sole of shoe torn off, and ankle and back strained. Was unable to work for five or six days. His ankle hurt him for nearly a year, but does not feel it now. Back sometimes troubled him before the accident, but has been worse since. Lost five or six days, at one dollar per day, and spent one dollar for medicine. The morning was clear. He was in good health, and walking four or five miles an hour. Had been using the track as a pass-way for 11 years without objection from any one. It was so used by large numbers of people. The engine had no cars attached, and passed him about as far as halfway across court-room, (about 20 feet.) He did not hear either bell or whistle. Was watching the Salem train, which was switching near him. Foundry is about a quarter of a mile from depot. Witness had walked about half way when struck. Had passed the engine, with freight train on side track, after leaving foundry. Engine came off side track on main line, and struck him from behind. Cross-examined: He was as well as usual that morning; sober; eyesight good; hearing good. Had no disability, and could have gotten off the road. Stopped a minute to talk with his daughter and another woman on track, but did not step off. They were coming from depot. He did not turn round, and did not see or hear the engine. If train was on the track, he could have seen it; walked the track half-way from foundry to depot. Salem train was on side track. Was looking at it, but had no business with it. Engine was on side track when it struck him, east of Davie street. North Carolina Railroad track and Cape Fear & Yadkin Valley track are 10 or 12 feet apart. Did not hear the bell ringing, but did not swear the bell was not ringing. Murphy was engineer. Sprinkles was first man who came to him. Does not think he walked between the tracks, but on main track, because it is a better walk. Had no idea engine was behind him. Sprinkle, a witness for plaintiff testified he was helping to shift Salem train. Heard some one cry out. Turned round and saw plaintiff lying on the ground two or three feet from track. Was within 20 feet to where plaintiff was struck. Saw engine coming, and it ran onto the main line. "Think it was running four or five miles an hour. At that time, Sa-

lem train was shifting. Heard engine that struck plaintiff coming. Don't recollect whether bell was ringing. Have been on railroad eight years. Engine passed plaintiff ten or twelve feet. Saw it come to 'cross-over' track; thence back to main track, and up main track towards the turn-table." Plaintiff then introduced city ordinances. It was admitted that ordinance forbade trains running over four miles an hour within certain limits, and that plaintiff was struck by engine within those limits, and that plaintiff was not a trespasser.

Testimony for defense: Murphy testified he was an engineer on Richmond & Danville road, and was, when plaintiff was injured, running the engine which hurt him. Came in on North Carolina Railroad track and ran on foundry track. Left train on foundry track, and backed the engine on "cross-over track" to main line, and down main line to switch leading to turn-table. First saw plaintiff when pulling in on foundry track. He was on main line. Next time witness saw him, he was walking on Cape Fear and Yadkin Valley Railroad track, and the next time 8 or 10 feet in rear of tender on said track. Did not see him on the track before he was struck. Witness' seat is on right side of engine. Wiley Holt was on left side. A man on left side of track cannot be seen by engineer in less than 10 to 13 yards. Holt was ringing the bell, sitting in fireman's seat, and told witness: "You have knocked a man off." This was the first that witness knew of plaintiff being there. Witness looked back, went 8 or 10 feet and stopped, reversing the engine. Was using no steam at the time. "Have been an engineer thirty years." It was admitted that witness was an expert. Defendant's counsel asked witness: "If engine had been rolling down the track over four miles an hour, could you not have stopped in the time you did actually stop?" Question objected to upon the ground that the negligence of the witness was the alleged cause of the accident, and the character of the question was calculated to indicate the answer desired. Objection overruled, and exception noted. The witness answered: "No. If it had been going over that speed, it could not have been stopped in that distance." Witness stated that at the time plaintiff was struck the engine was not running over four miles an hour. Cross-examination. "If going five miles an hour, could stop in fifteen or twenty yards." Witness stopped in ten yards. Ran about length of engine and tender. Did not and could not see plaintiff, who was on left side. When witness first saw him, he was walking four or five miles an hour. Did not see him when he stopped on North Carolina track. If witness had been notified in time, engine could have been stopped before striking plaintiff, who crossed foundry track and got on main

line ahead of engine. Wiley Holt, for defendant, testified that he was sitting on south side of engine when plaintiff was struck. As engine came on main line plaintiff was standing "facing us, talking to two women who had their backs to us." Engine started on main line for depot. Plaintiff was walking between main line and Cape Fear track just before he was struck. He started across main line in front of engine, and was struck and knocked off. Witness was ringing the bell at the time. Cross-examination: Witness did not tell plaintiff he saw him on the track, and thought he was going to step off. Plaintiff is unfriendly to witness, and does not speak to him. Plaintiff stepped on track about 10 or 12 feet, as if he was going to cross. Did not notify engineer. Plaintiff could have jumped across before engine got to him. Murphy was re-examined by defendant, and stated that the character of Holt was good, except as to fighting. There was no other evidence to the same effect. The plaintiff was reexamined, and stated that he had a conversation with Holt just after the accident, and he said: "I saw you on track, and thought you stepped off. Murphy did not see you." Plaintiff states he never got off main track until he was knocked off, and does not think the engineer saw him.

Plaintiff introduced a plat of tracks alluded to, and requested the court to charge: (1) Walking upon the track by a trespasser does not *per se* constitute such contributory negligence as will bar a recovery for injuries sustained from the negligence of the servants of a railroad; and such trespasser may recover, if he did nothing else to contribute to the injury. Refused. (2) Acts, to constitute contributory negligence, must be the proximate and not the remote cause of the injury, and such acts as directly produce, or concurred in directly producing, the injury. Given. (3) It is required by a railroad company to exercise more care than otherwise necessary, in running its trains in a populous town. Refused. (4) Where the public, for a long series of years, has been in the habit of using a portion of the track for a crossing or passway, the acquiescence of the company will amount to a license, and impose on it the duty of reasonable care in the operation of its trains, so as to protect persons using the license from injury. Refused. (5) Although the person upon whom the injuries were inflicted contributed thereto by his negligence, if the defendant might have avoided them by ordinary care, and did not, damages may be recovered. Refused.

The court further charged: "As to the first issue, if the accident was caused by negligence of defendant, the jury should answer, 'Yes;' otherwise, 'No.' The burden is on plaintiff to show negligence. If the engine was moving four miles an

hour, defendant not being at a crossing, it was not negligence not to ring the bell, unless the failure to ring the bell is shown to have contributed to the injury. If you find from the evidence that the engineer failed to ring the bell, that did not relieve the plaintiff from the necessity of taking ordinary precaution for his safety. Negligence of defendant in that particular was no excuse for plaintiff's negligence. He was bound to look and listen, to avoid an approaching train, while walking on the track. If he could have seen or heard the engine approaching, and he omitted to do so, and carelessly and thoughtlessly walked on the track, he was guilty of negligence, and contributed to his injury; and the consequences cannot be cast upon the defendant. If the company had, by long consent, allowed the public to pass and repass on the track where plaintiff was struck, then plaintiff was not a trespasser; but in the use of it the plaintiff must use precautions that a man of ordinary understanding, and in the possession of the ordinary senses of men, would use to avoid injury to himself by passing trains. The company has a right to the unobstructed use of its track for the purpose of running its trains." At request of defendant, the court further charged that if the engineer did not see, or by reasonable diligence could not have seen, the plaintiff on the track, there was no negligence on his part; that it is the duty of every person on the track to get off when an engine is approaching, and not to do so is negligence, and this whether there was an ordinance forbidding an engine from moving more than four miles an hour or not. The plaintiff had no right to put himself in the way, and rely on the ordinance to save him. If he saw the engine approaching, it was negligence to remain in the way, whether the bell was ringing or not.

Plaintiff excepted to the refusal of the court to charge as requested. The plaintiff moved for judgment *non obstante verdicto*, and for an inquiry as to damages, on the ground that contributory negligence was not a ground for defense against gross negligence, as found by the jury; the plaintiff having alleged gross negligence in his complaint. The motion was overruled, and the plaintiff appealed from the judgment rendered against him.

R. M. Douglas for appellant.

D. Schenck for appellee.

AVERY, J.—The first assignment of error rests upon the refusal of the court below to render judgment in favor of the plaintiff upon the verdict. The plaintiff declared in his complaint that he was walking upon the track of the defendant company in returning from his place of business, "as he had

been in the habit of doing for several years without objection from the defendant, within the corporate limits of the town of Greensborough, when, owing to the gross negligence of the defendant's servants, he was struck from behind by a locomotive engine belonging to the defendant, and thrown from the track, and was thereby much injured." To the issue, "Was the plaintiff injured by the negligence of the defendant as alleged?" the jury responded, "Yes," while they found in answer to the second issue, that the plaintiff, by his own negligence, contributed to cause the injury.

The most learned and discriminating text writers concur in the opinion that, in actions arising *ex delicto* there is no degree of negligence that can be described by the word "gross" alone. But where an injury is due and can be traced directly to the wilful act of another, he is not absolved from liability by the concurrent negligence of the injured party, as he is not where, by the exercise of ordinary care, he could, notwithstanding the fault of the injured party, have saved the latter harmless. Shear. & R. Neg. §§ 36, 37; Cooley, Torts, 674. Hence, we often find in opinions emanating from this and other courts the expression, "gross and wanton negligence;" but the former word is never used to describe a degree of carelessness that will excuse the fault of a plaintiff in exposing himself to danger, except where it is improperly held synonymous with either the word "willful," "malicious," or "fraudulent." Shear. & R. Neg. § 3; Wilds v. Hudson Riv. R. Co., 24 N. Y. 430; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Neal v. Gillett, 23 Conn. 437; Cunningham v. Lyness, 22 Wis. 245; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343. Wharton in his work on Negligence, § 64, maintains that, outside of the rule applicable to common carriers, which makes them, according to the circumstances, either insurers, or bound to show the care of a prudent man in the conduct of his own business, or liable for gross negligence, there are no recognized degrees of diligence or negligence that can be described by the words "slight" or "gross." Culbreth v. Philadelphia R. Co., 3 Houst. (Del.), 392; Whart. Neg. § 500. In The New World v. King, 16 How. (U. S.), 474, Justice CURTIS, for the court, goes much further, when he says, speaking of actions arising out of contract as well as tort: "If the law furnishes no definition of the terms 'gross negligence' or 'ordinary negligence' which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned." If the plaintiff had alleged that the defendant com-

Degree of negligence—
"Gross."

pany or its servants had willfully, wantonly, purposely, or maliciously run an engine against and injured him, a very different question would have been presented. In *Manly v. Wilmington, etc., R. Co.*, 74 N. Car. 655, this court said: "When the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied upon the ground that the injured party must be taken to have brought the injury upon himself." That case was subsequently cited with approval, as to the first point, in *Rigler v. Charlotte, C. & A. R. Co.*, 94 N. Car. 610, 26 Am. & Eng. R. Cas. 386, and in *Walker v. Town of Reidsville*, 96 N. Car. 382. See also *Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120; *Lafayette & I. Co. v. Adams*, 26 Ind. 76; 2 Wood, Ry. Law, § 319.

We think, therefore, that, as the plaintiff did not declare that the engineer or fireman inflicted the injury willfully, wantonly, or through malice, the word "gross" must be treated as a mere expletive, and the use of it as characterizing the negligence alleged makes no material difference in the meaning of the complaint; and the finding that the plaintiff was injured "as alleged" must be treated as an affirmative response to an issue, involving only the question whether the defendant failed to exercise ordinary care in the management of the engine, and thereby injured the plaintiff.

As the jury found, in answering the second issue, that the plaintiff, by his concurrent negligence, contributed to cause the injury, the judgment rendered must stand, unless there was error in misdirecting the jury. *Manly v. Railroad, supra*; *Smith v. Richmond & D. R.*, 99 N. Car. 241, 34 Am. & Eng. R. Cas. 557; *Troy v. Cape Fear & Y. V. Co.*, 99 N. Car. 298, 34 Am. & Eng. R. Cas. 13; *Chambers v. Western N. C. R. Co.*, 91 N. Car. 471; *Turrentine v. Richmond & D. R. Co.*, 92 N. Car. 638, 23 Am. & Eng. R. Cas. 460; *Rigler v. Charlotte, C. & A. R. Co., supra*. In reference to framing issues for the consideration of the jury, this court has, by repeated adjudications determined: (1) That only issues of fact raised by the pleadings must be submitted to the jury. *Wright v. Cain*, 93 N. Car. 296; *Carpenter v. Tucker*, 98 N. Car. 316; *Emery v. Raleigh & G. R. Co.*, 102 N. Car. 209, 37 Am. & Eng. R. Cas. 253. (2) The verdict, whether upon one or many issues, must establish facts sufficient to enable the court to proceed to judgment. *Emery v. Railroad Co., supra*. (3) Of the issues raised by the pleadings, the judge who tries the case may, in his discretion, submit

Pleading—
"Gross" neg-
ligence.

Findings—
Submission of
issues.

one or many, provided that neither party is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions, on some issue passed upon. *Emery v. Railroad Co.*, *supra*; *Meredith v. Cranberry Iron & Coal Co.*, 99 N. Car. 576; *McDonald v. Carson*, 94 N. Car. 497. In accordance with these rules, this court has held that, in trying a case like that before us, where contributory negligence is pleaded as a defense, it is not necessary to confine the jury to the single issue whether the injury was caused by the negligence of the defendant, if the judge, in his charge, explains the evidence relied on tending to establish contributory carelessness on the part of the plaintiff, and instructs the jury to respond in the negative if they believe that plaintiff, according to the law, as given by the court, contributed to cause the injury. *Scott v. Wilmington & W. R. Co.*, 96 N. Car. 428. On the other hand, it was held to be error in the trial judge to refuse to submit an issue involving only the plaintiff's want of care, and afterwards omit such instruction. *Kirk v. Atlanta & C. A. L. R. Co.*, 97 N. Car. 82. In the present case, it would not have been erroneous to confine the jury to the single issue first considered by them, instead of framing two, as we do not think that chapter 33, Laws 1887, can be construed to make a new issue necessary, because a specific averment was required to make a defense available. This defense, like that of estoppel, may be covered by instruction, and considered as bearing on a more comprehensive issue, such as one involving title. *Meredith v. Cranberry Iron & Coal Co.*, 99 N. Car. 576; *Carolina Cent. R. Co. v. McCaskill*, 94 N. Car. 746, 25 Am. & Eng. R. Cas. 83. But the jury could, doubtless, have been made to understand the testimony, and the law applicable to it, much more clearly, and the labor of the judge would have been made lighter, in this as it would in many other such cases, if the jury had been allowed to pass separately not only upon the question of plaintiff's as well as the defendant's negligence, but also upon a third question raised by the pleadings, discussed by counsel on appeal, and suggested by the instructions asked for—whether, notwithstanding the plaintiff's carelessness, the defendant, by the exercise of ordinary care, could have prevented the injury.

It was admitted on the trial that the plaintiff was not a trespasser, and the judge subsequently told the jury that he was not. In the fourth paragraph of the instructions given, as in the entire charge, the court proceeded upon the assumption that the defendant must exercise ordinary care. It was not erroneous to substitute said paragraph for the first instruction asked, nor to

Duty of railroad company.

refuse to give that numbered 4, offered by plaintiff. If it was error to refuse to tell the jury that a railroad company is required to exercise more than the usual amount of care, because of the greater peril to persons passing, in running its trains in populous towns, it was cured by the response to the first issue; and, for the same reason, it is now unnecessary to decide whether the law was correctly stated in the instructions numbered 1 and 6, given by the court.

When a person is about to cross the track of a railroad, even at a regular crossing, it is his duty to examine, and see that

Duty of persons on railroad tracks—
Lookout.

no train is approaching, before venturing upon it; and he is negligent when he can, by looking along the track, see a moving train, which, in his attempt to blindly pass across the road, injures him. *Bullock v. Wilmington & W. R. Co.*, 10 S. E. Rep. 988, (decided at this term;) 2 Wood, Ry. Law, § 323. Even where it is conceded that one is not a trespasser, as in our case, in using the track as a footway from a foundry to his house, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road, and impede the passage of trains. A railroad company has the right to the use of its track, and its servants are justified in assuming that a human being who has the use of all of his senses will step off of the track before a train reaches him. *Whart. Neg.* § 389 *a*; *Parker v. Wilmington & W. R. Co.*, 86 N. Car. 221, 8 Am. & Eng. R. Cas. 420; 2 Wood, Ry. Law, § 320. The plaintiff was known to the fireman, and presumably known to have ordinary intelligence, and to be able to hear an approaching train. The plaintiff could not recover if the engineer and fireman, without any actual knowledge of or acquaintance with him, had acted as they did on the assumption that he would get out of the way. There was no error, therefore, in giving the instructions numbered 3, 5, 7, 8, or 9.

The plaintiff "would not swear" that the bell was not rung, while the engineer and fireman both testified that it was rung. There was no error, however, in the instruction predicated upon the supposition that they failed to ring it. According to the plaintiff's own testimony, he stood upon the track, with his back towards the engine, and did not see it till after he was stricken by it. He was, therefore, in any aspect of the case, negligent; and the jury would not have been warranted in finding that the defendant could have prevented the injury by using ordinary care, because it was not even negligence, unless it grew out of violating a town ordinance, when it was apparent that the plaintiff was awake, and in full possession of all his senses, to run the engine at the rate of five miles an hour. If it was running at five miles an hour—and the only

testimony is that it was running four or five—it is manifest that a reduction of the speed to one mile less an hour would not have prevented the injury, by enabling the plaintiff to see with his face turned in the opposite direction. But all this might, possibly, have been more clearly presented if there had been a third issue, and his honor had said there was no testimony to support an affirmative finding on it. There is no error, and the judgment is affirmed.

Willfully Injuring Person on Track—Sufficiency of Complaint.—Where the complaint in an action for damages for causing the death of plaintiff's decedent, alleges that while the deceased was walking along a street going to the defendant's depot, the defendant unlawfully, carelessly and willfully ran one of its trains over him, that said willful, careless, negligent and unlawful act of the defendant consisted in running the train through the city along the highway at a dangerous rate of speed, and by increasing its dangerous rate of speed as it approached deceased and without ringing the bell on the locomotive in violation of an ordinance, etc., it is not sufficient to charge a willful killing, notwithstanding the use of the words "willful," "careless," and "unlawful," the specific acts charged being the running of the train at a high and dangerous rate of speed without ringing the bell in violation of a city ordinance, and being only sufficient to establish negligence in the running of the train. *Sherfey v. Evansville & T. H. R. Co.*, Ind. Sup. Ct., Jan. 11, 1890.

Willful Negligence—Instructions.—When an instruction requested by the plaintiff as to willful negligence is already complete, it is not error for the court to omit to add "There is little distinction except in degree, in a positive effort to do wrong and an indifference to whether wrong is done or not." *Sherfey v. Evansville & T. H. R. Co.* Ind. Sup. Ct., Jan. 11, 1890.

Contributory Negligence—Failure to Look for Approaching Train before Stepping on Track.—When the evidence shows that the deceased while waiting at a station to take a train, under the mistaken belief that his own train was just starting, left the platform, ran across the track, directly in front of a passing train by which he was struck and killed, there can be no recovery, as the accident was caused by his own negligence in failing to look for the approaching train, and a non-suit is properly entered. *Irey v. Pennsylvania R. Co.*, Pa. Sup. Ct., Feb. 24, 1890.

Deceased was killed on a switch which had been run out from defendant's road at a saw-mill, for the purpose mainly of loading lumber from the mill. The switch was about 1,000 feet in length, extending from the main track to a planing mill, and was straight except that it was slightly curved where it joined the main track. The saw-mill was situated about half way from the main track to the planing mill, and only a few feet from the track. On the opposite side of the switch from the mill, was situated a building called the "file room" which was used for filing saws, and was 7 or 8 feet distant from the switch track. Deceased filed saws in this building, and he and the other employees of the saw-mill were in the constant habit of crossing and walking along the switch track. On the day that the injury occurred, the conductor had left the train, and some cars were being moved on to the side track. The cars that caused the injury had a brakeman on them. The engine had been detached from them and they had been kicked on to the switch, the engine not following them. The brakeman, at the moment of the injury, had turned his back towards the direction that the detached cars were going to draw the coupling-pin. He testified that before he turned for that purpose he was looking ahead and

saw no one on the track. The evidence was conflicting as to how fast the detached cars were moving, but the preponderance was that the speed was greater than usual. The station signal had been blown on the arrival of the train, but no signal had been made before or near the time that the switch was being made. The mill machinery was making a louder noise than did the detached cars. The work of the deceased when he was filing saws also made a noise which drowned that of the approaching cars. There was evidence that the view of the switch track in the direction of the main track from which the detached cars were coming was somewhat obstructed to a person standing in the door of the file-house, but none that it was obstructed to a person advanced a few feet from the door towards the switch track. Deceased came out of the file-room, and just as he got upon the track the cars struck him. *Held*, that the evidence showed that when there was nothing to prevent seeing his danger, deceased heedlessly stepped upon the track, that he was guilty of contributory negligence, and that a verdict for the plaintiff could not be sustained. *Sabine & T. R. Co. v. Dean*, Tex. Sup. Ct., Feb. 11, 1890.

In an action by the state to the use of a father whose son had been killed by the alleged negligence of the defendant company, it appeared that the deceased was 11 years of age and was struck by a passenger train, which being behind time was running at the rate of 30 or 35 miles an hour. His mistress, who had sent him on an errand to a neighbor's house some 300 or 400 yards distant, had cautioned him to keep off the track. She testified that when she heard the sound of the approaching train, she ran to the door and caught sight of the boy and the engine at the same time; that the engine was at that time at a private crossing, and that the boy was being tossed up by the engine and scrambling with his hands. The testimony of the engineer was to the effect that there was no whistling post requiring him to blow the whistle on approaching a crossing and that he did not do so; that he first saw the boy about 40 or 50 yards beyond the crossing running between the railroad tracks, and that he was never upon the track upon which this train was running so far as he could see. He also testified that if the boy had remained between the two tracks he would not have been killed, and that he might easily have stepped from the track and got out of the way of the train. The fireman corroborated the engineer, and testified that the boy was not on the track until just before he was struck; that he attempted to cross the track ahead of the engine, but stumbled and fell upon the pilot. *Held*, that there was no evidence of negligence on the defendant's part requiring the submission of the case to the jury. *Baltimore & O. R. Co. v. State*, to use of *Savington*, Md. Ct. App., Dec. 18, 1889.

Same—Failure to Heed Warning and Signals.—Plaintiff's husband was killed by a passenger train while walking along the track of the defendant. The evidence showed that the train was 10 or 15 minutes behind time; that it was running at the rate of 25 to 30 miles an hour; that the deceased was walking upon the railroad track going in the same direction the train was going; that there was a public road alongside the track upon which the deceased could have walked; that the engineer could have seen him 400 yards from the place of the accident; that the danger signal was given, although exactly at what time before the killing did not appear, that two colored girls on the track heard the train and left the track and hallooed to the deceased that the train was coming, but that the deceased failed to get off the track and was run over and killed. *Held*, that notwithstanding the fact that it had been the custom for the people of the neighborhood to walk along the track, the deceased by failing to pay attention to the signals given by the train, or the warning given him by the girls, must be deemed to have been guilty of such contributory negligence as precluded a recovery. *White v. Central R. Co.*, Ga. Sup. Ct., Nov. 4, 1889.

STEINER

v.

PHILADELPHIA TRACTION CO.

(Pennsylvania Supreme Court, April 7, 1890.)

Personal Injuries—Traction Car—Frightened Horse—Ringing Bell near Crossing.—Where damages are claimed for injuries sustained through the plaintiff's horses taking fright at a traction car, and running away and injuring him, evidence that the gripman rang the bell of the traction car at or near a street crossing where it was his duty to stop and ring, does not establish negligence on the part of the gripman.

APPEAL from Court of Common Pleas, Philadelphia County.

Trespass to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's servants. Plaintiff appeals from a judgment of non-suit.

Emanuel J. Page, Patrick F. Dever, and Theodore F. Jenkins for appellant.

Thomas Leaming for appellee.

PER CURIAM.—The plaintiff has no cause to complain that he was nonsuited by the court below. He had no case. His claim was a mere attempt to speculate upon the credulity or the prejudices of a jury, and the learned judge below properly held there was nothing to submit to them.

The plaintiff was a butcher, residing in Montgomery county, and was in the habit of driving a two-horse wagon to the city of Philadelphia, loaded with meats, which he sold to his customers. On the day of the accident he was engaged on Columbia avenue, delivering meat from his wagon, when his horses became restive at the approach of one of the cars of the defendant company. He then left the rear end of his wagon, and went to the horses' heads to quiet them. The car approached, and when near the horses stopped, the gripman at the same time ringing his bell. The horses took fright, broke from plaintiff, and ran away, by means of which he was injured, and for which injuries he now claims compensation from defendant company. These are the substantial facts of the case, briefly stated. They disclose no negligence on the part of the company. The car did not touch the plaintiff or his team. The accident was wholly due to the fright of his horses.

Facts.

It was urged, however, that the gripman stopped his car

where he should not have done so, and rang his bell needlessly. But he stopped at or near a crossing where he had a right to stop. We do not know why he stopped, nor are we bound to inquire. It may be he saw the horses were restive, and feared coming into collision with them. So far as ringing the bell was concerned, the case closely resembles

**Negligence—
Ringling bell
of traction
car near
crossing.**

Philadelphia Traction Co. v. Bernheimer, 125 Pa. St. 615, 38 Am. & Eng. R. Cas. 487, where we said: "It was not negligence to ring the bell as the car approached Fourth street. It would have been negligence not to have done so." The bell of a traction car is not only rung at all street crossings, but frequently at other places, to warn persons of its approach. Nor does such ringing necessarily tend to frighten horses. If it did, there would be accidents daily. We have said emphatically that it would be negligence not to ring at a crossing, and the plaintiff would probably have been swift to invoke the benefit of such rule had his injury resulted from an omission to do so. If we now say, or permit a jury to say, that it is negligence to ring at a crossing, what rule would the company or its gripman have to guide them in such cases? Aside from this, if the gripman saw that plaintiff's horses were restive, it does not follow that he had any reason to apprehend the accident that occurred. The plaintiff, according to his own testimony, was at their heads, and might naturally be supposed to be able to control them. There is no analogy between this case and the use of a steam whistle wantonly blown in a crowded place. The steam whistle naturally tends to alarm horses; the traction bell does not. What was said of a steam road in Philadelphia, W. & B. R. Co. v. Stinger, 78 Pa. St. 219, is applicable here: "We have held these corporations to a strict line of responsibility for the failure to give sufficient warning of the approach of their trains at road crossings. It would not be just to them, nor safe to the travelling public, for us now to criticize too closely the precise amount of noise employed in giving the needed warning at such places." We may supplement these remarks by saying that, in view of the crowded condition of the streets of the city of Philadelphia, the number of women and children and of aged and infirm persons who are constantly crossing the tracks of the traction company, not only at street intersections, but elsewhere, we would be loth to sanction a principle which would make a gripman hesitate to ring every time his hand touched the bell rope. Judgment affirmed.

CONLEY

v.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. CO.

(Kentucky Court of Appeals, December 17, 1889.)

Death by Willful Neglect—Liability to Collateral Kindred.—Under the Kentucky statute conferring a right of action for negligently causing death, no recovery can be had for death caused by willful neglect, where the deceased left neither widow nor children.

Trespassers—City or Town—Custom of Inhabitants to Cross Track—Duty of Train Hands.—Although ordinarily train hands are not bound to look out for trespassers, yet, where a train is running through a city or town, and the people thereof habitually cross the track at any and all hours at such points as may be convenient, and the train hands have reason to know that such is the habit, it is their duty to look out for such persons and take reasonable precaution by ringing the bell, etc., not to run over them.

Same—Negligence—Running Section of Train Without Signals.—A train was cut in two about three-fourths of a mile from a depot in a small town. The front part of the train was drawn by the engine at a more rapid rate until it passed the depot, and the rear part ran at a slower rate by its own momentum down grade from the place of uncoupling to the depot. The rear part of the train was permitted so to run without any light being placed at the front end of it, nor was any signal placed on the rear part of the train, or any person stationed thereon in a position to look out for danger and give warning or stop the train. Plaintiff's intestate was at the depot about the time the front part of the train passed it. He attempted to cross the track, but was run over by the rear part of the train and was killed. The night was very dark and a drizzling rain was falling. The place where the deceased attempted to cross was not a public crossing. *Held*, that under the circumstances it was inexcusable negligence on the part of the company to turn the rear part of the train loose without any lights or person upon it to give warning, and that the plaintiff was entitled to recover although he was technically a trespasser.

APPEAL from Circuit Court, Mercer County.

T. C. Bell and *Thompson & Roach* for appellant.

C. B. Simral and *Durham & Jacobs* for appellee.

BENNETT, J.—The appellant, as administrator of Ed. Conley, sued the appellee in two counts for killing his intestate, —one for willful, and the other for gross and ordinary neglect. There is no allegation in either count of the petition that the intestate left either widow or child. Besides, the proof shows that he left neither. Therefore, according to the repeated decisions of this court, recently rendered, the appellant cannot recover on the count for willful neglect.

Action for
death by wil-
ful neglect—
Collateral
kindred.

The only question is, does certain evidence, as it appears in the record, if believed, authorize the appellant to recover for ordinary or gross neglect? Let us see. The

Facts.

appellant's intestate was killed almost immediately, at Burgen depot, Mercy county, Ky., by the rear part of the appellee's stock train, No. 10, running over him on January 8, 1883, about 7 o'clock at night. On behalf of the appellant, the evidence shows that, while the said train was coming south, about 7 o'clock at night, it being very dark and a drizzling rain falling, said train was cut in two, probably about three-fourths of a mile from Burgen depot, and the front part of the train was drawn by the engine, at a more rapid rate, until it passed Burgen depot, and stopped at the stock-yard, and the rear part of the train, which included three box-cars and one caboose, ran at a slower rate by its own momentum, the grade being a down grade, from the place of uncoupling nearly to the Burgen depot, from thence level to said depot, until it got almost to the said depot, when it stopped; that the said rear part of the train was thus permitted to run without any light being placed or kept at the front end of it, but a light was at the rear end; that no signal was kept on said rear part of the train; that no person was stationed thereon, in a position to look out for danger and give warning or stop the train; that the appellant's intestate was at the depot about the time the front part of the train passed it on its way to the stock-yard; that he boarded at the section-house, situated on the west side of the railroad track, and the depot was situated on the east side of it; that there was a public crossing about 50 feet south of the depot, at which he could cross to go to the section house, or he could cross by a pathway, used principally by the section house people, and thereby shorten the distance that he would have to go; that said road and path crossed the track nearly at the same place; that, by the front part of the train blowing its whistle and passing the depot, the deceased, not being able to see the rear part of the train, there being no light in front, and not hearing its silent approach, believed that the track was clear, and started to cross it, either at the public or private crossing, and, while crossing, was struck down and run over, or if not on either of said crossings, but on a private part of the track when struck, it was the darkness of the night that caused him to miss his way, and the silent, undiscernible approach of the rear portion of the train that caused him not to hear or see it. On the other hand, the appellee's proof shows that it did not uncouple its train until it had passed the depot, going north, and had arrived at the stock-pens, at which place the train was uncoupled, and the rear portion permit-

ted to run back to a point just south of the depot, where it stopped; that a light was on the rear part of the caboose, which light, by reason of said portion running back toward the south, was in front, and furnished sufficient light to enable the deceased, or other persons on or near the track, to easily discern the approach of said portion of the train; that the deceased, while trespassing on the track, either in attempting to cross just ahead of said train, or while walking on the track, or attempting to cross by crawling under the train, in either case, negligently failing to notice that the train was approaching, was killed.

It may be that the deceased was run over and killed while he was on the track, either walking on it or crossing it not at a point where he had the legal right to be. If this be so, he was technically a trespasser, and only technically a trespasser. So, the question is, did the fact that he was technically a trespasser excuse the appellee, if the deceased was killed under the circumstances contended for by the appellant? According to the appellant's contention, the appellee having uncoupled its train on a dark night, without a light in front to warn persons having occasion to be on the track of its approach; without a lookout to warn persons, that might be on the track, of danger, and powerless to discover such persons for the want of a light; without a person on the train to stop it in case of danger to such persons, or if, having the train in charge, unable to discover such danger for the want of light; and having suffered it to run up to its depot, situated in a town of 150 or 200 inhabitants, living on either side of the track, near the depot, and a public and private crossing near the same, and persons likely to be crossing the track in going to and from the depot at that hour, either for business or pleasure, also crossing in going to their respective homes from business pursuits; and as these persons, by seeing and hearing the main part of the train pass the depot, would naturally suppose that the way was clear, and would attempt to cross the track at the most convenient place of crossing, as is customary in towns of that size, without fear of evil, or, by reason of the darkness of night, might miss their way, and cross at a point where there was no public crossing,—that, under these circumstances, it was inexcusable negligence to thus turn said rear train loose, to silently and unseen run down any person that might be crossing the track, whether or not at a crossing.

We recognize and repeat the rule that the operators of a train are ordinarily under no obligation to look out for trespassers; that, as a rule, they have the exclusive right to their

track, and have the right to presume that no person will trespass upon it, and are therefore under no obligation to look out for them. But this rule as to looking out for such persons has its exceptions,—one of which is that where the train is running through a city or town, and the people thereof may cross the track, at any and all hours at such points as may be convenient, whether public or not, and the operators have reasons to know that such is the habit, it is their duty to look out for such persons, and take reasonable precaution not to run over them.

Obligation to keep lookout for trespassers. In making approaches to these places or going through them, they are required not only to look out, but to ring the bell, etc., whether approaching a crossing or not. Why so? It is for the purpose of seeing persons in time not to injure them, and of warning them, whether trespassers or not, of the approach of the train, in order that they may get out of the way. This they are required to do, even in the bright day-time. If they fail to do this, it has been held, time and again, that such failure is actionable negligence. In this line is the case of Louisville & N. R. Co. v. Schuster (Ky.), 7 S. W. Rep. 874, 35 Am. & Eng. R. Cas. 407; Shelby's Adm'r v. Cincinnati, N. O. & T. P. R. Co., 85 Ky. 224. But the case here, according to the appellant's facts, is that the appellee having turned its rear cars loose, unlighted in front, and therefore not under control, so far, at least, as to render any assistance, the night being dark, in case of a collision with any person that might be on the track, the cars being separated from the engine, their approach would be, at least as compared with the ordinary movement of trains, almost noiseless, and not likely to be heard or noticed; also in a dark night, and in the absence of a light to arrest the attention, their approach would not ordinarily be observed until too late to get out of the way. It is a well known fact that a person standing in a straight line with a train that is approaching or receding is often unable to discern that it is moving. This is so even in the day time. In a dark night it may be regarded as a fixed fact that a person, being on the track of a roadbed would be unable to discern cars unlighted, approaching him by their own momentum, until they had gotten immediately up to him.

Exceptions to rule—Cities or towns.

So the question is, is the turning these cars loose, under the circumstances, such a departure from a manifest duty towards the local public as to entitle the appellant to recover for the injury inflicted on his intestate by reason of such departure, although the intestate was at the time a technical trespasser upon the track? The rule applicable to actions for the

negligence of the defendant that, if the negligence of the plaintiff so far contributed to the injury as that the injury would not have occurred but for such contributory negligence, he cannot recover, is as well settled as any principle of law. But is it applicable to a case where the negligence on the one side consists of a technical trespass, as the one in this case, and a failure to perform a manifest duty, as in this case? The omission to do or the doing anything that is the manifest duty of a person not to do or to do, does not entitle such person to immunity from liability, in damages, to the person injured thereby, simply because such person was a mere trespasser, and but for which the injury would not have occurred. Where the injury is the result of the non-performance or a violation, however innocent of intention, of a plain and manifest duty for the protection of human life or safety, the party thus acting will not be heard to say, in justification, that the person thus injured was merely a trespasser. This is true even though the party injuring was dealing with his own property, and the party injured was a technical trespasser thereon. Of course, the foregoing rule does not apply, if the injured party, knowing the existence of the danger, purposely or negligently puts himself in its way. He thus puts himself in its way at his peril, and should be considered as having purposely brought the injury on himself, and should be left to bear it. A train of running cars—these were running, according to the appellant's proof, at the rate of about fifteen miles per hour—is more dangerous, if thus circumstanced, to the life of persons with whom it comes into contact, than that of the most ferocious and powerful wild animal, and, certainly, it cannot be lawfully turned loose to run by itself, and expose persons that may be on the track, either by accident, mistake, or design, to its destructiveness.

Allowing cars to run down grade without signals or lookout.

Humanity positively forbids the owner of property that is dangerous to human life and safety to knowingly turn such property loose, even upon his own ground, where it will do mischief, even to a technical trespasser. Such conduct is regarded as utterly at war with the principles of humanity, and as smacking of savagery. That the party hurt was a mere trespasser, and, otherwise than in this legal aspect, perfectly innocent and harmless, does not excuse the person that injured him by means manifestly injurious to human life and safety. By being technically a trespasser he does not forfeit all right to protection. This fact is made manifest in various ways; for instance, although, ordinarily, the conductor in running his train is not bound to look out for trespassers, yet he is bound, if he discovers him

Injuries to trespassers.

in time, to use all means at his command to protect him. Why is he not ordinarily required to look out for trespassers in running his train? It is not because the trespasser has forfeited his right to protection, but it is because he has the right to presume that he will not trespass upon the track. But if he does trespass, and is seen, it is the duty of the conductor to use all the means at his command to protect him. This obligation presupposes it to be the duty of the owners of the train to have it always properly and efficiently equipped and controlled, and, while it is ordinarily not their duty to look out for trespassers, yet they have no right to voluntarily deprive themselves of the means and power of protecting them, if discovered in time. If the train, with steam up and under headway, should be abandoned and permitted to run by itself, no one would doubt the owner's liability for any injury done to a trespasser on the track, while thus running. Why so? Because those whose duty it was to have the train in charge had abandoned it to the destruction of human life, and had deprived themselves of the power of preventing it. It has been repeatedly held—indeed, we do not recall a single exception to the rule—that if a person knowingly turning a ferocious animal loose, even in his own inclosure, which is likely to be visited by mere trespassers, and if any trespasser, ignorant of the presence of the animal, is injured by such animal while trespassing in the inclosure, the owner is liable in damages for the injury.

The owner has the right to the exclusive use of the animal and inclosure, but he has no right to do that which is a manifest injury to others, even though such others be trespassers; for there is no proportion between the technical trespass in merely walking through another's inclosure and the manifest wrong done to the life and safety of all persons, whether trespassers or not, that may come in contact with it. It is the duty of the citizen not to knowingly do an act that will hazard human life and safety, unless it is done to prevent crime. If the appellee had turned loose on the track a ferocious bull to run down it, and, in running down it, it had killed the appellant's intestate, would it be doubted that the appellee would be liable in damages for the injury, although the intestate was a trespasser? Both the bull and the track belonged to the appellee, and the deceased was technically a trespasser on it, else he would not have gotten killed, yet the appellee is made responsible for the killing, because he does that which is manifestly dangerous to the lives of all persons that may, rightfully or wrongfully, be on the track. If it be said that the parallel between the cases just put and the running of the train is wanting in the fact that the running of the train is a

business operation, and is governed, as to matters of damages, by a violation of prudential business rules and obligations, and, in the cases put, the parties are held responsible for violating police duties and obligations, as a general proposition this distinction is correct. But here the train, possessing most destructive power, contrary to a manifest duty, is turned loose to run, unlighted and uncontrolled, and kill all persons, whether trespassers or not, that may be overtaken by it. Such conduct is a violation of a manifest duty to the public, trespassers and all, not to turn such a power loose. An instruction ought to have been given in accordance with the foregoing views. The judgment is reversed, with directions to grant a new trial, and for further proceedings consistent with this opinion.

Action for Wrongful Death—Collateral Kindred—Kentucky Statute.—By the Kentucky statute, when the deceased has left neither widow nor children surviving him, no cause of action survives to his personal representative for his death by the wilful neglect of another. *Kentucky Cent. R. Co. v. Wainwright's Adm'r*, Ky. Ct. App., March 20, 1890.

CARRINGTON

v.

LOUISVILLE & NASHVILLE R. CO.

(88 Ala. 472.)

Appeal by Plaintiff—Inadequate Verdict—Questions Considered.—When the plaintiff appeals from a verdict in his favor for damages for injuries sustained, any ruling of the trial court bearing merely on the question of defendant's liability, and not affecting the amount of damages recovered, will not be considered, however erroneous it may be.

Signals—Duty of Engineer at Common Law—Collection of Houses.—In the absence of a statutory provision, the engineer in charge of a train is under no duty to ring the bell or blow the whistle when approaching a collection of houses constituting an unincorporated village.

Lookout for Trespassers—Duty of Engineer.—The engineer is not bound to keep a look-out for trespassers upon the track in the absence of some special fact or reason calling for diligence in that respect.

Same—Collection of Houses Fenced off From Track.—The fact that many people lived in the vicinity of the place where the trespasser was killed, does not constitute a special reason calling for the duty of keeping a look-out for trespassers when the track is fenced off from the adjoining houses, and there is no evidence tending to show that the track was generally used by the people in the vicinity.

Gross Negligence—When Sufficient to Overcome Contributory Negligence.—Gross negligence is not sufficient to overcome contributory negligence on the part of the person injured, unless it is negligence to a degree that is wanton, reckless or intentional.

Trespassers on Track--Evidence of License.—In an action for damages for negligently killing a person who was walking upon a railroad track, evidence tending to prove that persons in the neighborhood were accustomed to cross the tracks by a foot path 100 yards or so distant from the place of the accident is irrelevant to prove a license to use the track for pedestrian purposes generally.

Same—License—Habit of Using Track for Pedestrian Purposes.—In an action for damages for negligently causing the death of a person who was walking upon a railroad track, evidence that other persons were in the habit of walking along the track at or near the place where the killing occurred, is inadmissible, mere acquiescence in the use of the track being insufficient to justify the trespass.

APPEAL from Birmingham City Court.

W. M. Brooks, J. M. Van Hoose and David Smith for appellant.

Jones & Falkner and Hewitt, Walker & Porter for appellee.

SOMERVILLE, J.—The action is brought for the alleged killing of the plaintiff's intestate by collision with an engine of the defendant railroad company; the injury having occurred while the deceased was walking on the track or right of way of the defendant. The verdict of the jury was in favor of the plaintiff, and his damages were assessed at the sum of \$500.

1. It is perfectly apparent, upon the whole record, that this finding of the jury necessarily determined every issue raised in favor of the plaintiff, excepting alone the issues affecting the amount of recovery. They manifestly decided that the defendant was guilty of culpable negligence, for which it was liable in damages to the plaintiff. They decided, likewise, that the deceased was not guilty of contributory negligence in any particular which would bar a recovery by his personal representative. The only matter as to which the plaintiff in the court below, who is the appellant here, can or does complain is, as we have said, the amount of the recovery. He maintains that the jury should have found a verdict for a larger sum than \$500. In this aspect of the record, we have a direct authority in the case of *Donovan v. Railroad Co.*, 79 Ala. 429, for the proposition that we will not consider as reversible error any ruling of the primary court bearing merely on the naked question of the defendant's liability, and not affecting the amount of damages recovered, however erroneous it may be in fact, because, if error, such ruling is error without injury to the plaintiff.

2. The accident which is the basis of the present action occurred on February 10, 1887, before the present Code went into operation. As the statute then stood, the duty of an engi-

Verdict for plaintiff—Review of questions of negligence on appeal.

neer to ring the bell or blow the whistle was expressly required only at the places enumerated in section 1699 of the Code of 1876. This section included regular depots, public road crossings, curves crossed by public roads where the engineer could not see at least one-fourth of a mile ahead, and incorporated towns or cities. Code 1876, § 1699. The duty had not then been extended to villages, whether incorporated or not, as in section 1144 of the Code of 1886. Conceding that the collection of houses, with their inhabitants, which is shown to be adjacent to the place of the accident, constituted a village, there was no statutory duty imposed on the engineer in charge of defendant's train to ring the bell or blow the whistle at the place where Carrington, the deceased, was killed.

Duty of engineer to give signals.

3. The deceased was a trespasser and had no lawful right to walk on the defendant's right of way. There was therefore no duty devolving on the engineer to anticipate or expect such an unlawful trespass; and hence no duty existed to keep a vigilant lookout for the perpetrator, in the absence of some special fact or reason which called for diligence in this particular. *Bentley v. Georgia Pac. R. Co.*, 86 Ala. 484, citing *Womack's Case*, 84 Ala. 149; *Blanton's Case*, 84 Ala. 154; *Donovan's Case*, 84 Ala. 141. As forcibly said by STRONG, J., in *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375, "there is as perfect a duty to guard against accidental injury to a night intruder into one's bed-chamber as there is to look out for trespassers upon a railroad, where the public has no right to be." The sooner this salutary principle is understood by the public, the greater will be the security of human life, and the fewer will be the number of deaths from reckless exposures of person to the perilous danger of walking on railroad tracks, in the presence of moving engines, of which one now reads every day in the public press.

Duty to keep lookout for trespassers.

4. The third charge requested by the plaintiff, in effect, assumes that, "if many people lived in the immediate vicinity where Carrington was killed," this would constitute a special reason calling for the duty of keeping a vigilant lookout for trespassers. This hypothesis is rather indefinite, especially in view of the fact that the railroad track was not in a street of the alleged village, the adjacent houses being fenced off from the track, and there was no evidence tending to show that the track was used generally by the people in the vicinage, or even to such extent as to charge the defendant with notice of any probability of encountering a trespasser at or near the point of accident. The charge was properly refused, inde-

Lookout—
Duty where track adjoins collection of houses.

pendently of the fact that it relates only to the question of defendant's liability, and not the measure of plaintiff's damage.

5. The second and third charges assert, in substance, that the decedent's want of ordinary care—or, in other words, his contributory negligence—would be overcome by the “gross negligence” of the defendant, without regard to its nature, as evidencing the presumption of a conscious indifference to consequences. “Gross negligence,” generally speaking, would not be sufficient to overcome contributory negligence of plaintiff's intestate, unless it was negligence to a degree that was wanton, reckless, or intentional. We have many times so declared the rule. *Bentley's Case*, 86 Ala. 484; *Womack's Case*, 84 Ala. 149; *Cook's Case*, 67 Ala. 533; *Frazer's Case*, 81 Ala. 200; *Blanton's Case*, 84 Ala. 155. Even the analogous principle, which authorizes the recovery of exemplary damages, does so only when the negligence is so gross as to raise the presumption of a conscious indifference to consequences. *Lienkauf v. Morris*, 66 Ala. 406; *Western Union Telegraph Co. v. Way*, 83 Ala. 542.

6. The fourth charge, asserting that the jury may find a certain conclusion from the state of facts hypothesized, was merely an argument and announced no proposition of law. It was properly refused. *Hussey's Case*, 86 Ala. 34; *Snider v. Burks*, 84 Ala. 53.

7. The court properly refused to admit the evidence tending to prove that persons in the neighborhood were accustomed to cross the track by a footpath 100 yards or so distant from the place of the accident, in order to get water from a spring on the east side. The decedent was not crossing at this path for any such purpose, but was walking up the track laterally, or longitudinally. Hence an alleged implied license, given to others, to cross the path to obtain water, would be irrelevant to prove a license to use the track for pedestrian purposes generally.

8. Nor did the court err in refusing to allow the plaintiff to prove that other persons were in the habit of walking along the track at or near the place Carrington was killed. We so held in *Womack's Case*, 84 Ala. 149, 4 South. Rep. 618. The evidence does not tend to show a voluntary license from the railroad company for the public to use its track as a highway for pedestrians; mere acquiescence not being invitation. *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind. 59, 31 Am. & Eng. R. Cas. 432; *Iron Co. v. Davis*, 79 Ala. 308.

We find no error in the record, and the judgment is affirmed.

Personal Injuries—Duty to Maintain Lookout and Discover Trespassers.—See *Barker v. Hannibal & St. J. R. Co.* (Mo.), 37 Am. & Eng. R. Cas. 292; *Galveston, H. & S. A. R. Co. v. Ryon* (Tex.), 34 *Id.* 30; *Virginia Midland R. Co. v. White* (Va.), 34 *Id.* 22; *Mobile & O. R. Co. v. Stroud* (Miss.), 31 *Id.* 443; *Frazer v. South & North Ala. R. Co.* (Ala.), 28 *Id.* 565; *Scheffler v. Minneapolis & St. L. R. Co.* (Minn.), 19 *Id.* 173; *McAlister v. Burlington & N. W. R. Co.* (Iowa), 19 *Id.* 108; *Terre Haute & I. R. Co. v. Graham* (Ind.), 12 *Id.* 77; *East Tennessee, V. & G. R. Co. v. White* (Tenn.), 8 *Id.* 65; *Houston & T. C. R. Co. v. Sympkins* (Tex.), 6 *Id.* 11; *Townley v. Chicago, M. & St. P. R. Co.* (Wis.), 4 *Id.* 562; *Marcott v. Marquette, H. & O. R. Co.* (Mich.) 4 *Id.* 548; notes 31 *Id.* 417; 25 *Id.* 355.

Personal Injuries—Review on Appeal—Extent of Injuries.—If no exception has been taken at the trial of an action for personal injuries, and the judgment has been affirmed by the general term of the supreme court, the New York court of appeals will, when the only question in dispute in an action for personal injuries is as to the extent of the injuries, dismiss an appeal on motion, the record failing to disclose any question for review. *Dalzell v. Long Island R. Co.*, N. Y. Ct. App., Jan. 21, 1890.

Injuries to Trespassers—Gross Negligence—Misleading Instructions.—In an action for damages for killing plaintiff's son, where the accident occurred at a place where there was no reason to expect any one to be on the track, and at a time when the law imposed on railroad companies a liability for an injury resulting in death from the negligence of an employe only when that was gross, an instruction that if the jury believed from the evidence that the proximate cause of the injury was the gross negligence of defendant's servants, that if they believed that the deceased was on the track of the defendant and the employes operating the train saw him, or could, by the exercise of proper care and attention, have seen him, and "by the use of ordinary care and caution" could have avoided injuring him, and that such employes failed "to exercise reasonable care and caution," the jury might find for the plaintiff, is erroneous and misleading. *Missouri Pac. R. Co. v. Brown*, Tex. Sup. Ct., Nov. 29, 1889.

SHAW

v.

NEW YORK & NEW ENGLAND R. CO.

(*Massachusetts Supreme Judicial Court, November 27, 1889.*)

Negligence—Construction of Track—Absence of Bunters.—A railroad track was laid upon a descending grade, which at its lower end stopped at a street. There was no bunter or other obstruction to prevent cars from going beyond the end of the track. There was a telegraph pole near the end of the track and in the street. Plaintiff, a hackman, was standing with his team in the street. Some cars suddenly and apparently without the fault of the railroad company, became detached from a train, ran beyond the end of the track, struck against the telegraph pole which was thereby broken, and the wires fell upon plaintiff's horses frightening them and causing them to injure plaintiff. *Held*, that the jury were authorized to find that a bunter should have been put up to guard against just such accidents, and that the evidence was sufficient to sustain a verdict for the plaintiff.

ON EXCEPTIONS from Superior Court, Hampden County.

Tort by Henry W. Shaw against the New York & New England R. Co. for damages for personal injuries sustained through defendant's negligence. Among the tracks adjacent to the depot in Springfield of defendant's railroad, was a spur track for the purpose of loading and unloading freight cars. No obstructions or bunters had been placed at the end of this track to prevent cars from running beyond. About six feet from the end of the track was a telegraph pole. This track and other tracks in the freight yard joined the main-line track at a point some distance to the east where the main-line track had a downward grade. Plaintiff on the day of the accident, drove up to the platform of the depot, alighted from his hack, and was in the act of collecting fare from a passenger, when some freight cars standing at the end of the spur track were driven against the pole. The force was sufficient to break the pole and to cause the wires to fall upon the horses. The horses were so frightened that they ran away and injured plaintiff.

At the time of the accident, the railroad employes were drawing a train of about 12 cars on to the main-line track. As the cars reached the main-line track a brakeman signaled to the engineer to give them "the slack," *i. e.*, to back sufficiently to relieve the tension and admit of drawing out the pin of a car. The engineer gave "the slack." As soon as he stopped his engine, and as the train straightened out a draw-bar pulled out of the fifth car from the engine, causing that car and seven others to run down the spur track into the car standing at the foot thereof. Defendant's employes endeavored to stop the eight cars by setting the brakes, and there was no evidence that those cars were not provided with suitable brakes, or that the railroad employes were guilty of any negligence in the management of them after they broke away. The draw-bar which pulled out was held in position on the car to which it belonged by an iron key which passed through the bar in a slot made for the purpose. The draw bar with all its attachments including the key, was of the kind generally used on freight cars. The pulling out of the draw-bar was caused by the key stripping off, and allowing the bar to be pulled through an iron collar against which the key rested. A defect in the key could only be discovered by an inspection thereof while the draw-bar was on the car and the key in its position, and the defendant employed a competent inspector who had inspected it on the arrival of the car that day. The court refused to rule at the defendant's request (1) that on all the evidence on the case the plaintiff could not recover; (2) that if, without the fault or negligence of the defend-

ant, the draw-bar key and the draw-bar pulled out, causing the train to break away, and the defendants by its servants made due, reasonable and proper exertions to control it after it had thus broken away, the plaintiff cannot recover; (3) that if, without the fault or neglect of the defendant, the draw-bar of the freight car pulled out and by reason thereof the train escaped from the control of defendant's servants, and while thus beyond their control ran into the telegraph pole, causing the wires thereon to be dislodged or broken, so that they fell upon the horses of the plaintiff, by reason of which said horses escaped from his control and he was injured, the plaintiff cannot recover; (4) that if the train escaped from the control of the defendant's servants without fault or negligence on their part, the defendant is not liable, although had a bunter or other obstruction existed at the end of the track, the pole would not have been hit and the wires thereon dislodged. The court refused to give the instructions as requested, but gave them with the following modification: "unless there was a defect in the construction of the road that rendered it probable that the cars would go off of the end of the track." The court also instructed the jury that the defendant was under no legal obligation to put up a bunter; that it was for it to say whether it would have a bunter or not, but if it did not, it was held to such care as would be necessary to the management of the cars to make the management of them reasonably safe without a bunter. The jury having returned a verdict for the plaintiff, the defendant excepted.

J. B. Carroll for plaintiff.

Chas. L. Long and *R. M. Saltonstall* for defendant.

C. ALLEN, J.—The injury for which the plaintiff seeks to recover arose in this manner: The railroad track was laid upon a descending grade, which at its lower end stopped at a street. There was no bunter, or other obstruction, to prevent cars from going beyond the end of the track. There was a telegraph pole near the end of the track, and, as we infer, in the street; and the injury to the plaintiff was caused by cars which accidentally, and apparently without the defendant's fault, had become detached from a train running beyond the end of the track, and striking against the telegraph pole, which was thereby broken, and one or more of the wires fell upon the plaintiff's horses, and frightened them. The want of a bunter or other obstruction at the lower end of the track was the defect relied on. We cannot say that this was not such a defect as to warrant a verdict for the plaintiff. The jury might properly find that a

Negligence—
Omission to
erect bunter.

bunter should have been put up, in order to guard against just such accidents. The defendant now objects that the want of a bunter was not a defect covered by the declaration. But the request for instructions, and the ruling given, did not rest upon the pleadings at all. If the request had rested on this ground, the plaintiff might have had leave to amend, if an amendment was necessary, which is doubtful. This objection is not now open to the defendants. Exceptions overruled.

PEYTON

v.

TEXAS & PACIFIC R. CO.

(*Louisiana Supreme Court, October Term, 1889.*)

Negligence—Use of Inferior Engine with Fireman as Engineer.—It is negligence on the part of the railroad company, in running accommodation trains through a city to a fair ground in the suburbs, where large numbers of people congregate around the station, to use an inferior locomotive, run by a fireman instead of a skilled engineer, and to run its trains at a dangerous speed in approaching the station.

Contributory Negligence—Assuming Dangerous Position in Attempt to Save Life.—It is not contributory negligence in a person to risk his life, or place himself in a position of great danger, in an effort to save the life of another, or to rescue another from a sudden peril or great bodily harm. "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons."

Excessive Damages—Reduction by Court on Appeal.—The allowance of excessive damages by juries for personal injuries must be discountenanced. Judgment amended, reduced from \$25,000 to \$5,000.

APPEAL from District Court, Parish of Caddo.

Wise & Herndon for appellant.

U. S. Jones, M. C. Elster, and Bell & Randolph for appellee.

POCHE, J.—Plaintiff claims damages in the sum of \$40,000 for personal injuries inflicted on him by one of the defendant's trains through the alleged carelessness and fault of the railroad employees. The defense is a general denial, coupled with the plea of contributory negligence. Defendant appeals from verdict and judgment in the sum of \$25,000.

The evidence is conflicting on all the pertinent and material facts involved in the controversy. After a thorough study of the record, we find from the preponderance of the testimony the following substantial facts as bearing on the issues of neg-

ligence on the part of the company, and of contributory negligence on the part of plaintiff:—The accident occurred in November, 1888, at or near the fair grounds situated on the outskirts of the city of Shreveport, while a fair was being held there. During the week of the fair, the company ran accommodation trains from its depot in the city to the grounds and back, on a schedule of 15 minutes each way. While plaintiff, and a large number of other visitors at the fair, were standing on a temporary platform erected near the grounds, awaiting an outgoing train, on which they intended to return to the city, he noticed on the track, and in dangerous proximity to the approaching train, a person, who was a friend of his, and who was in an inebriate condition, standing with his back to the train, and apparently unconscious of threatened peril. He at once resolved to save his friend, and, running to him, he succeeded in pushing him off of the track, but was himself struck by the pilot-beam of the locomotive to which the train was attached, and received injuries from which he suffered great pain, was disabled for several months, and from which he was not yet relieved at the time that the case was tried below, at the end of the past month.

Facts.

We are satisfied from the preponderance of the testimony, which is very conflicting on this point, that in approaching that platform, full of people of all ages, which was the regular fair-ground station for the defendant's accommodation trains, situated at the intersection of a public thoroughfare, the train was driven with unusual speed, and at a dangerous rate, without which the accident would not have occurred. It is also in proof that the locomotive used on the occasion was a switch-engine,—not such as should be used to carry great numbers of passengers,—and that it was in charge of a fireman, not a regular or competent engineer, who was at that moment performing the functions of the regular engineer, the latter having absented himself, in order to go to his evening meal. All these circumstances combine together to make a clear case of negligence against the company.

Negligence—
Use of inferior engine
with fireman
as engineer.

The question of contributory negligence must now be met. The argument on that point is that plaintiff brought on the accident himself, by his reckless attempt to jump on a railroad track immediately in front of an approaching train, at a close and dangerous distance from it. Plaintiff testifies, and he is corroborated by several unimpeached eye-witnesses, that without his or other prompt assistance the intoxicated man on the track would have been run over, and probably killed. Plaintiff who was a strong and vigorous man,—of more than ordinary strength,

Contributory
negligence—
Attempt to
save life.

—states that from the appearance of things he believed that he could save the man and avoid injury himself.

Similar positions and circumstances have several times been presented to judicial investigation, as involving the question of negligence, and have been variously construed. But the opinion which commends itself to our approbation, as resting on sound principles of humanity, is to the effect that they do not constitute contributory negligence on the part of the person who is injured in the attempt. Text-writers on railroad law and kindred subjects have formulated the rule thus: "When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another, who is exposed to a sudden peril, or in danger of great bodily harm, it is held that such exposure and risk for such a purpose is not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons." The principle was culled from a well considered opinion of the court of appeals of New York, in the case of *Eckert v. Long Island R. Co.*, reported in 43 N. Y. 503. *Beach, Contrib. Neg. 45; 2 Thomp. Neg. 1174; Pierce, R. R. 328; Ror. R. R. 1029.* The ruling has received subsequent judicial sanction, and, appreciating it as rational, and as tending to foster a proper spirit of generous impulses towards persons who are in danger, we add our indorsement to that of other courts of last resort, in other states of the American Union. The evidence is satisfactory on the point that the attempt of plaintiff to save the life of a human being, or at least to rescue him from imminent peril, cannot be characterized as rash or reckless, in the judgment of prudent men, and that his venture would have been successful and harmless, if the train had not approached the station with reprehensible speed.

We now approach the question of the quantum of damages which plaintiff should recover in the case. In view of the finding of the jury, which met with the approval of the district judge, in his refusal of a new trial, the solution of that question, to our satisfaction, under our desire and our duty to do even handed justice to both litigants, has not been free of difficulty, and hence it has cost us much thought and study. As we have had occasion to say in several cases: "While we do not pretend to lay down any exact, arithmetical rule of proposition in the estimate of such damages, yet they must bear some kind of reasonable relation to each other in different cases,—with the reserve, however, that the damages should always

Excessive
damages—Re-
duction of
verdict.

be substantial." *Towns v. Vicksburg, S., etc., R. Co.*, 37 La. Ann. 636. A review of our reports in similar cases points to only two occasions on which this court has allowed damages in excess of \$10,000 for personal injuries; and these were for very grievous and permanent results. *Barksdull's Case*, 23 La. Ann. 180; *Choppin's Case*, 17 La. Ann. 19. Among the cases we find an allowance of \$7,000 for an accident resulting in the death of the head of a large family, to whom he was the only support, and the allowance of \$5,000 for the death of a man similarly situated; and, in another case, a judgment of \$3,000 for a like result. *Curley's Case*, 40 La. Ann. 810; *Faren v. Sellers*, 39 La. Ann. 1011; *Clairain v. Western Union Telegraph Co.*, 40 La. Ann. 178. And, in so far as our observation has gone, we find that the courts of other states of the Union have not reached as high figures as this court has allowed.

Substantial damages must be awarded in proper cases; but, by all means, speculative litigation must be discouraged, and, if possible, checked. Now, in the present case we have no hesitation in saying that the verdict is largely excessive, and beyond all measure, and all precedents. That the plaintiff was seriously injured; that he suffered great pain; was exposed to loss of time, loss of business, to large expenses for medical assistance,—cannot be denied, and evidence to that effect is uncontradicted. But it is equally true that he has rapidly improved under medical treatment; that for months he has been able to walk, go about and attend to business, without the use of crutches, and without the need of assistance; and, above all, that he is yet alive, fully able to earn his livelihood, and well disposed to enjoy life. His most serious injury, and the most irritating cause of his sufferings, is the inflammation of his hip joint. But competent physicians, some of whom have rendered him professional services, and others who have critically examined him, all testify that, with proper treatment, prudent care, and attention, he can be radically cured. Great reliance is placed by his counsel, as a fruitful source of damages, on the fact that he is now afflicted with hernia, characterized by symptoms of threatening strangulation; which they confidently attribute to the railroad accident. Plaintiff himself testifies that it is a result of the blow which he then and there received. But, of course, his testimony is not that of an expert; and none of the physicians who were examined testify directly in the same sense. One of them says: "It [hernia] is frequently the result of direct violence; but I can't say as to this." True, plaintiff says that one of the physicians, who attended to him at his home for several days, saw his hernia, and pronounced it very serious,

and perhaps dangerous. But this is merely hearsay; and a strange coincidence must be noted in this connection,—the failure of plaintiff to take the testimony of that physician, and of another physician of his neighborhood, who rendered the first medical aid which he received after the accident. Nothing in the nature of this case, or in the surrounding circumstances, can legally screen this party from the effect of the rule which jurisprudence applies to litigants who fail to produce important testimony easily within their reach, and presumably under their control. *Ketchum v. Texas Pac. R. Co.*, 38 La. Ann. 779; *Day v. New Orleans Pac. R. Co.*, 35 La. Ann. 694.

We are constrained to notice another circumstance which goes a great way to negative the assertion that hernia was one of the results of the accident. Nearly three weeks after he had been injured, plaintiff was placed, on the recommendation of his home physicians, under the treatment of Dr. M. M. Bannerman, of Grand Cane, La., as a surgeon of superior ability, who then took him, and had him under his charge for more than a month, including three weeks during which he was under the doctor's own roof, receiving his daily and almost constant attention, of the most intimate character. And yet in his testimony Dr. Bannerman does not make a single reference to hernia in connection with his patient. Far from it, his testimony contains the following very significant statement: "Plaintiff, during my treatment, complained of no other injury resulting from the railroad accident except that in his hip joint." It is in proof, and plaintiff himself testifies that many years ago he was ruptured on the right side, and it is shown that he is now ruptured on both sides; but the evidence entirely fails to trace the second rupture to the railroad accident. That element of damages must therefore be eliminated from the case. And we therefore conclude that an allowance of \$5,000 is amply sufficient to compensate plaintiff for all the pains that he has suffered, the loss of business and of time that he has incurred, to meet the expenses of past medical attendance, and to secure the future treatment and attention needed to fully restore him from the effects of the injuries which he received. To allow more would be enriching one litigant at the expense of the other.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount of damages to be recovered by plaintiff from twenty-five to five thousand dollars; and that, as thus amended, said judgment be affirmed; and that costs of appeal be taxed to plaintiff.

RINE

v.

CHICAGO & ALTON R. Co.

(Missouri Supreme Court, December 21, 1889.)

Trespassers on Track—Duty of Employees to Avoid Injuring.—In an action for damages for the death of plaintiff's son, it appeared that the deceased, in going from a street to a depot 500 feet distant, went upon the main track of defendant's railroad. He walked upon the main track about 50 feet to a switch, and then walked on a side track on which some cars were standing which had recently been left there by an engine. The engine, which was returning, was at the time from 90 to 150 feet distant. The engineer was at his proper place and could have seen deceased before he got on the track, but not after that, except by going to the other side of the cab. The fireman was on the top of the tender breaking coal, and could have seen deceased at any time after the latter went upon the main track after the road crossing. The engineer and fireman were not called as witnesses. *Held*, that as the accident happened at a depot where the employees would, in the discharge of their ordinary duties, be on the watch, the evidence was sufficient to show that the engineer and fireman knew the deceased was on the track, and could have avoided injuring him by the exercise of reasonable care.

Penalty for Wrongful Death—Construction of Statute—Negligence of Subordinate.—Mo. Rev. St., 1879, § 2121, which awards a penalty whenever any person shall die from injury occasioned by the negligence of "any officer, agent, servant or employe, whilst running or managing any locomotive, car, or train of cars," renders the company liable, although the negligence was not that of the superior in command, viz: the engineer, but of his subordinate, the fireman.

SHERWOOD, J., dissents.

APPEAL from Circuit Court, Saline County.

H. I. Priest and *G. B. Macfarlane* for appellant.

J. D. Shewalter for respondent.

BLACK, J.—This is the second appeal prosecuted by the defendant in this case. The first is reported in 88 Mo. 392, 25 Am. & Eng. R. Cas. 545. It was then, and is now, conceded that young Rine was wrongfully upon the track at the time and place when and where he was killed, and that he was guilty of negligence in going upon and remaining upon the track. In view of these facts, we held, on the former appeal, that the defendant's liability must be limited to negligence on the part of the fireman and engineer after they knew that Rine was in an exposed and dangerous position, and that, when they had such knowledge, it became their duty to use all the means at their command to save his life. The case was tried pursuant to those directions, on in-

Case stated.

structions given at the request of the plaintiff and others given at the request of the defendant, to which no substantial objections are made.

The point is now made, and much relied upon for a reversal, that there is no evidence tending to show that the fireman or the engineer saw Rine on the track in time to have avoided the calamity.

While the evidence is, in a general way, the same as on the former appeal, it is not the same upon the question of knowledge of Rine's presence on the track, from the

Facts in evidence.

fact that the fireman and engineer were not called as witnesses on the second trial by either party.

The evidence now is, in substance, this: Rine came into Cor-der on the local freight train from the east. The depot at that place is on the north, and the warehouse on the south, side of the main and two side tracks. Part of this freight train was left standing at the depot on the main track; and, while the evidence is not direct, it seems some of the cars were removed to the outer side track, and left standing at the warehouse. The engine and tender then went to a coal shaft, about a quarter of a mile west of the depot, and in the meantime Rine went to the village. On his return he came to a point where the highway crosses the main railroad track, which point is 500 feet west of the depot. He then went east towards the depot, on the main track, some 50 or 60 feet to a switch attachment, and then looked back, and must have seen the engine and tender on their return, for they were not more than 90 or 150 feet distant from him. He stepped on the outer side track, and walked on, with his back to the approaching tender and engine, the tender being the nearest to him, for a distance estimated at 60, 80, and 120 feet, when the tender ran over him. The engine and tender were going at the rate of 8 or 10 miles per hour, and could have been stopped in a distance of from 15 to 25 feet. No effort was made to check or stop them. The engineer was at his proper place on the north side of the cab, and could have seen Rine before he got on the side track, but not after that, except by going to the south side of the cab. The fireman was on top of the tender, with something in his hand, breaking coal, and could have seen Rine at any time after the latter got on the main track at the road crossing. Rine evidently stepped upon the side track, supposing the engine and tender would go back to the depot on the main track. There can be no doubt that he was in a dangerous position from the moment he stepped upon the side track, and the question is, whether the foregoing evidence tends to show that the fireman or engineer saw him upon that track.

This question must be determined from all the circumstances. There were no obstructions, such as cars, on any of the tracks between the coal shaft and the depot or warehouse. The switch seems to have been left open by design, doubtless so the engine and tender could go back to the warehouse, and get the cars left at that place. The fireman must have known this switch was open; certainly so, when he passed over it. He knew the cars were standing on the track at the warehouse, and that he would come in contact with them. It was his duty to guard against a collision with the standing cars, and it is reasonable to believe that he had an eye in that direction. The accident happened at a depot, while the engine and tender were going back and forth over the tracks, and common information teaches us that the employes would, in the discharge of their ordinary duties, be on the watch. Evidence of negligence need not be direct and positive. "In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence; and, as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence—a kind of evidence which might not be satisfactory in other classes of cases open to clearer proof." 1 Shear. & R. Neg. (4th Ed.), § 58. A demurrer to the evidence admits every fact which the jurors may infer from the evidence before them, and should be allowed only when the evidence thus considered fails to make proof of some essential averment. *Noeninger v. Vogt*, 88 Mo. 592, and cases cited. All the circumstances surrounding the accident are to be considered, and, when this is done, we are of the opinion that there is evidence from which the jury could well find that the fireman at least saw Rine on the track, and that, too, in time to have saved his life. The principal objection made to this conclusion is, that as the servants of the defendant were not bound to be on the watch for Rine, they ought not to be held to have had knowledge that he was on the track, simply because they were in a position, and had an opportunity to see him. Had the court told the jury that an opportunity to know was equivalent to knowledge, then there would be force in the objection; but the court did not so instruct. Knowledge, like actual notice, may be proved by direct evidence, or it may be inferred from other facts and circumstances. When it is inferred from facts and circumstances it is actual knowledge, the same as when proved by direct evidence. An opportunity to know will, under some circumstances, go far to show knowledge, and, under other circumstances, it may be of little value. We think the plaintiff made out a

Duty of employes to avoid injuring plaintiff.

prima facie case—one entitling her to go to the jury; and, as the defendant did not call those servants who could have given direct evidence, it has no one to blame but itself for any mistake on the part of the jury, if any they made.

The defendant makes the further point that it is liable only to pay the penalty of \$5,000, when the negligence is that of the servant who is the superior in command namely, the engineer in the present case. The statute awards the penalty whenever any person shall die from an injury occasioned by the negligence of "any officer, agent, servant, or employe, whilst running or managing any locomotive, car, or train of cars." Section 2121, Rev. St. 1879. This statute manifestly includes the negligence of any and all servants who are engaged in running or managing the locomotive, car, or train of cars. The fireman is as much within the contemplation of the statute as the engineer, or even the conductor. The sense of the law is too plain to admit of doubt, or to call for extended remarks.

The judgment is therefore affirmed. All concur (BARCLAY J., in the result), except SHERWOOD, J., who dissents.

WHALEN

v.

CHICAGO & NORTHWESTERN R. CO.

(*Wisconsin Supreme Court, February 25, 1890.*)

Personal Injuries—Person on Track—Duty of Company to Keep Lookout— Plaintiff was injured at a place where those in charge of the trains knew that adults and children in considerable numbers were likely to be passing, and that without precautions being employed to avoid injury, persons, and particularly children, passing there, were liable to be injured. The accident occurred at dusk. The lights were set on the train, and the conductor and brakeman were using lighted lanterns. The train was moving slowly and comparatively noiselessly. It was a long train, containing 40 cars or more, and it was doubtful whether any signal by bell or whistle that the train was in motion was then being given. The injury was caused by the cars backing upon the plaintiff. *Held*, that as matter of law, defendant was guilty of negligence in not providing a proper lookout on the train.

Same—Contributory Negligence—Degree of Diligence Required of Minor.—Plaintiff, who was scarcely 13 years of age, was familiar with the methods of operating trains at the place of the accident. When he went upon the track there was sufficient light to enable him to see the cars ahead of him. He thought they were standing still, and probably they were when he looked at them. He allowed his attention to be diverted by a passing

engine, and took no further notice of the cars. It was not necessary for him to walk upon the track to reach his destination but he did so towards the approaching cars; and he had walked at least 100 feet upon it when the cars which had probably been in motion all the time backed upon him. *Held*, that in view of plaintiff's age, the court properly submitted to the jury the questions of the degree of diligence required of him, and whether he was guilty of contributory negligence.

Same—Evidence—Boarding Cars to Get a Ride.—On plaintiff's cross-examination the court sustained an objection to a question whether he had at any time climbed upon the cars to get a ride, but he was subsequently allowed to testify that he did not attempt to climb upon the cars the night he was injured. He also testified later that, sometimes when the trains were switched there, he got on the freight cars for a ride. *Held*, that there was no error in sustaining the objection to the question, and that even if there were, it was cured by plaintiff's subsequent testimony.

Same—Evidence as to Number of Persons on Track.—One of plaintiff's witnesses was allowed to testify as to the number of people he had seen walking upon the tracks at the point of injury a year or more after the accident. *Held*, that the evidence, although otherwise incompetent, was rendered admissible by the previous testimony of the witness, that the number of people walking upon the track at that time was about equal to the number walking there when the plaintiff was injured.

APPEAL from Circuit Court, Marinette County.

The plaintiff, a minor, brought this action, by his guardian *ad litem*, to recover damages for personal injuries received by him while walking upon one of the tracks of the defendant company, on its depot grounds at Marinette, on the evening of August 31, 1888, caused by his being run against by a car of the defendant moving on such track. He alleges the negligence of the defendant as the ground of his action.

Some description of such depot grounds, and the tracks thereon, is essential to an understanding of the case. The main track of the railroad runs from the passenger depot in Marinette, in a southerly direction. About 80 rods south of the depot, it passes a water tank, and about 283 feet south of the tank it reaches certain coal sheds, 224 feet long. These structures are on the east side of the track. One hundred and eighty-eight feet north of the tank, towards the depot, a switch connects the main track with the north end of a side track, which extends south, parallel to the main track, on the west side thereof, and about 8 feet distant therefrom, 93 rods, or about 50 rods south of the south end of the coal sheds, where it again connects with the main track. This is called the "scale track," because scales for weighing cars are located therein, 176 feet north of the north end of the coal-shed. The grade of these tracks descends slightly to the north. North of the above-mentioned switch, about 76 feet, there is another switch, connecting the main track with what is called the "Menekaunee Branch," which is a track on the east side of the main line, running in a northeast direction. At the time

of the accident, and before, there were 60 or more dwelling houses in the vicinity of the coal-sheds; and the persons residing therein, and others, had been constantly accustomed, for nearly 20 years before 1888, to use such depot grounds and tracks as a footway to and from the city of Marinette, which is understood to be east of the depot, without any objection by the defendant. Plaintiff resided with his parents near the coal-sheds, and when injured was on his way from the depot to his home. He had lived there two years or more. It is conceded by the defendant that those people, including the plaintiff, and the public were licensees upon those grounds and tracks, by force of long user of them for that purpose without objection by the defendant.

On the evening the plaintiff was injured, defendant's freight train No. 16, consisting of 32 or 33 cars, passed the Marinette depot, from the north, about 6:45. It did not stop at the depot, but ran south beyond the south switch of the scale track, and backed north on that track. There were standing upon that track, in the vicinity of the coal-sheds, eight or nine loaded cars, coupled together, to be taken south by such train. Defendant's passenger train No. 2 reached the Marinette depot the same evening at 6:55, stopping 20 minutes for supper, and to take water and coal. The engine and tender of that train were uncoupled therefrom at the depot, and ran south on the main track to the tank where water was taken, and from thence to the coal-sheds for coal. The testimony tends to show that the conductor of the freight train No. 16 left his train at the switches north of the water tank, and, after the passenger engine had passed to go to the tank and coal-sheds, he threw open those switches: thus connecting the scale track and the Menekaunee track. This was done for the purpose of running the eight or nine cars standing on the scale track onto the Menekaunee track, so that, by running the engine around on the main track, it could take up these cars, return the same way with them, and couple them to the balance of the train. This would make up the train with those cars next the engine, where it was desired to have them. After the conductor of No. 16 had opened the switches as above stated, he signaled his train, which had been coupled to the eight or nine cars, and was standing still, to back north; and he walked up the track, south, to meet it. He met it at the scales, or a little north of that point, and climbed to the top of the first car. The train was moving slowly. He found a brakeman, about the middle of the eight or nine cars, loosening the brakes thereon. He directed the brakeman to go down and uncouple those cars from the caboose, which was at the rear of the original

train, and he did so. The engine was then stopped, and the eight or nine cars descended the grade by their own momentum, run upon the Menekaunee track, and were there stopped by the conductor, who immediately returned, and closed the switches. The passenger train then went south, immediately after which the freight conductor made up his train in the manner above indicated, and it also proceeded south.

The testimony also tends to show that the plaintiff was injured under the following circumstances: As already stated, he was going, when injured, from the depot to his home, near the coal-sheds. This was about 7 o'clock in the evening, and about one-half hour after sunset. It was dusk, but not dark. The lights upon the train were burning, and the conductor and brakemen were using lighted lanterns. The plaintiff passed up the main track, south, beyond the water tank. The engine of the passenger train was then at the water tank or came there about that time. When he had gone nearly half-way from the water tank to the coal sheds, the engine left the tank, and moved towards the sheds. He then left the main track, passed obliquely to the scale track, and walked south, up that track, between the rails. He saw the eight or nine cars on the track ahead of him, but thought they were standing still, and was not aware that the train to which they had been attached, was being backed down the track towards him. The engine on the main track passed him, making considerable noise. He turned his head to look at it, and continued to move on the side track in that position. After going in that manner probably 100 feet or more, without again looking south, he was struck by the rear car of the train. His foot was crushed, and afterwards amputated. It is probable that the cars on the side track had been thus moved north, about the same distance the plaintiff walked south on that track, before he was injured. The accident occurred a little north of the north end of the coal-sheds, and at about the time, or just after, the passenger engine reached the sheds. It also must have occurred before the conductor went upon the train, and probably while the brakeman was loosening the brakes on the more southerly of the eight or nine cars taken up on the side track.

The foregoing is believed to be a sufficient statement of the location of the tracks, the manner in which the trains were operated, and the circumstances of the injury complained of. The testimony also tends to show that the trains, on the day of the accident, were operated in the manner in which they had usually been operated for some time previously. It also tends to show that the plaintiff was familiar with the usual manner in which the trains were operated at that place. When

injured, the plaintiff was within two months of 13 years of age. The rulings of the court on the trial are sufficiently stated in the opinion. The jury returned a general verdict for the plaintiff, and assessed his damages at \$5,000. A motion for a new trial was denied, and judgment entered for plaintiff pursuant to the verdict. The defendant appeals from the judgment.

Winkler, Flanders, Smith, Bottum & Vilas for appellant.
Fairchild & Fairchild for respondent.

LYON, J.—I. On the subject of the negligence of the defendant company the learned circuit judge instructed the jury as follows: "Parties managing moving trains must provide a careful lookout in the direction that the train is moving in places where people, and especially children, are liable to be upon the track. When a train is being drawn by a locomotive, there is always a lookout, and means of giving notice and warning, to travellers on the track, or in places of danger, of the approach of the train. When a train is being backed, then the train is in such a condition, or in such a position, that other means of warning are required by the law, and, as I have given out in the rule, there must be some lookout provided, so that, in case parties, especially in localities where women and children are likely to be, where those parties are, they can be warned of approaching danger, if they don't see it."

It is undisputed that the train which was backed against the plaintiff and injured him, was in a locality where men, women, and children were likely to be upon the tracks, of which fact the employes of defendant operating the train had knowledge and that although a brakeman might have been on one of the eight or nine rear cars when the injury was inflicted, he was not there as a lookout, to warn people who were walking on the track of danger, and was not in the performance of any such duty. Such being the testimony, the instruction above quoted is equivalent to an instruction that because the place of accident was so used, and because there was no such lookout provided, the defendant was guilty of negligence. Is the instruction correct?

The testimony tends to prove, perhaps does prove, that when the accident happened the train which injured the plaintiff was being operated in the usual and accustomed manner. It is contended on behalf of defendant that, although the plaintiff was a licensee upon its track, it might still operate its railroad as it had been accustomed to do, and having done so in the

Instructions
as to defend-
ant's negli-
gence.

Duty of com-
pany to keep
lookout.

present case, the plaintiff has no right of action. There are many cases which, under certain circumstances, hold the rule maintained by the defendant. In those cases, damages have been refused to a mere licensee injured by a moving train, if the train was being operated at the time in the manner in which it had usually been operated theretofore. Thus in *Hogan v. Chicago, M. & St. P. R. Co.*, 59 Wis. 139, 15 Am. & Eng. R. Cas. 439, which was an action to recover for injuries to a child under six years of age, who had been injured by a train such child being a mere licensee upon the track, the above rule was applied, for the reason that the persons operating the train would not naturally expect a child to be upon the track at the place of the accident, and were not required to anticipate such injury as the probable result of moving the train. Hence, it was there held that the requirements of ordinary care were complied with by giving the usual signals by bell and whistle, although no lookout or watchman was provided to discover and give warning of danger to persons on the track, such precaution not having usually been taken at that place. Such application of the rule was made upon the authority of numerous adjudications referred to by Mr. Justice TAYLOR in his opinion in *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646, 15 Am. & Eng. R. Cas. 424. We are still of the opinion that the rule was correctly applied in the *Hogan Case*. But in the present case we have a state of facts materially different. Here the injury occurred at a place where those in charge of the train knew that adults and children, in considerable numbers, were likely to be passing, and that, without some precautions being employed to avoid injury, persons, and particularly children, passing there were liable to be injured by the backing of the train. This is more especially true because, although not dark, it was in the dusk of the evening when the plaintiff was injured. The lights were set on the train. The conductor and brakemen were using lighted lanterns, and the train was moving slowly, and comparatively noiselessly. Moreover, it was a long train, containing 40 cars or more, and the engine was necessarily a long distance, probably 70 or 80 rods from the place where the plaintiff was hurt. This fact might prevent him from hearing any noise the engine might make in pushing the train. It is also doubtful, to say the least, whether any signal, by bell or whistle, that the train was in motion, was then being given. We think the foregoing circumstances bring the case within the rule of *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis. 626, 4 Am. & Eng. R. Cas. 562, which is thus stated in the opinion by Mr. Justice CASSODAY: "It seems to be pretty well settled that a railroad company

must provide for a careful lookout, in the direction that the train is moving in places where people, and especially children, are liable to be upon the track. If they do not, and a person has been injured, then the company may, in the absence of contributory negligence, be held liable.' We conclude, therefore, that the jury were properly instructed, as matter of law on the undisputed evidence, that the defendant was guilty of negligence in not providing a proper lookout on the freight train which backed upon the plaintiff and inflicted the injury complained of.

II. The court submitted to the jury the question whether the plaintiff was guilty of negligence which contributed proximately to the injury. Certainly there is testimony tending to show such negligence on his part. The real question is, does the undisputed evidence prove conclusively that the plaintiff was guilty of such negligence? He was entirely familiar with the methods of operating trains at that point. When he went upon the scale track, there was sufficient light to enable him plainly to see the cars upon the track ahead of him. He thought they were standing still. They probably were standing still when he looked at them. He then allowed his attention to be diverted by the passing engine, and took no further notice of such cars. It was not necessary for him to walk upon the track to reach his home; and hence, when he chose to do so, an obligation of greater diligence was imposed upon him. He walked upon the track at least 100 feet, and the jury might have found from the testimony that he so walked a much greater distance. It is very probable that the cars were in motion nearly all the time he was walking upon the track. The inference of negligence from these facts is a very strong one. The only excuse we discover for allowing his attention to be diverted by the passing engine is that it does not appear he knew that the cars standing upon the track were to be backed north on the Menekaunee branch. Had he been an adult, with the same knowledge of the manner in which trains were usually operated at that point, we should be strongly inclined to hold that contributory negligence on his part was conclusively proved. But he was not an adult. He was a little less than 13 years of age. Under well-settled rules of law, the court properly submitted to the jury the question of the degree of diligence required of him. Counsel for the defendant have cited many cases in which the courts have held, as matter of law, that children as young as he were chargeable with contributory negligence, but each of these cases stands entirely upon its own facts, and no general rule can be deduced from them which should govern

**Plaintiff's
contributory
negligence.**

this particular case. The jury, who saw the plaintiff, and heard his testimony, were best able to determine the degree of diligence which should be reasonably required of him. They have determined that question in his favor, and we cannot, without a violation of legal rules, disturb their findings in that behalf. We must hold, therefore, that the question of contributory negligence on the part of the plaintiff was properly submitted to the jury.

III. Only two rulings upon the trial, and these upon objections to the admission of testimony, are urged as grounds of reversal. These will be considered briefly.

1. On the cross-examination of the plaintiff, he was interrogated as to whether he had at any time climbed upon the cars to get a ride. An objection to this question was sustained by the court. He was allowed, however, to testify, on such cross-examination, that he did not attempt to climb upon the cars the night he was injured. He also testified later that sometimes, when the trains were switching there, he got on the freight-cars for a ride. We perceive no error in this ruling; and, if it was erroneous, it seems to have been cured by the subsequent cross-examination.

Evidence—At-
tempts to
ride upon
cars.

2. In his direct testimony, a witness for the plaintiff was permitted, against objection, to testify as to how many people he had seen walking on the tracks at the point of injury in a given time, a year or more after the accident. This would have been incompetent, but for the further fact that the plaintiff had before testified that the number of people walking upon the track at the time mentioned by the witness was about equal to the number walking there when he was injured. The matter was of but little importance. We think the testimony of the witness which was objected to was rendered competent by such previous testimony of the plaintiff, as one method of ascertaining the amount of travel there at the time of the accident.

Evidence—
Number of
people on
track.

The judgment of the circuit court is affirmed.

CANFIELD

v.

CHICAGO & WESTERN MICHIGAN R. CO.

(Michigan Supreme Court, December 28, 1889.)

Personal Injuries—Ice upon Sidewalk—Negligence.—Where the evidence showed that from defendant's stand-pipe for supplying locomotives water fell upon a sidewalk where it froze, and that plaintiff, without any fault of her own, slipped thereon and was injured, the case is properly submitted to the jury.

Same—Damages—Aggravation of Infirmity—Pleading.—Where the declaration alleged that the plaintiff, through defendant's negligence, fell and received injuries to her arm and shoulder, and does not charge any abnormal change of condition, or any more than might happen from any serious injury to a sick or well person, and raises no inference that plaintiff before the injury was robust or weak, sound or unsound, and the evidence shows that the injury occurred as alleged, an instruction that if the jury believe that plaintiff's arm and shoulder were weak and disabled before the accident as the result of sickness, she cannot recover under the declaration for such disability or any aggravation of the same produced by the accident in question, is properly refused, although defendant has introduced evidence tending to show that plaintiff, when a child, suffered a severe illness which left her right arm and shoulder disabled and infirm.

CHAMPLIN, J., dissents.

ERROR to Circuit Court, Berrien County.

Smith, Nims, Hoyt & Erwin (Lawrence C. Fyfe, of counsel),
for appellant.

N. A. Hamilton for appellee.

CAMPBELL, J.—Plaintiff, a young woman of about 22, fell on the ice on a sidewalk near defendant's water-tank, in the village of St. Joseph, and claims to have received injuries for which she recovered damages in the circuit court of Berrien county. The declaration sets out that she, "by said fall, was greatly injured, to-wit, her head, shoulder, and side were severely cut and bruised, her collar-bone was broken, and she received permanent injuries, and her health was and is permanently injured; and by reason of which injuries the plaintiff became and is, and for a long time will be, lame and sick, and has suffered great bodily pain, and has been disabled from attending to her business for six months and more, and incurred an expense of two hundred dollars for medical attendance and nursing," etc. Both counts are substantially alike in regard to statement of damage. The

testimony showed that defendant had a stand-pipe, with an arm swinging round, to supply the locomotives; that this arm swung so as to let water fall upon the sidewalk, where it froze, making very slippery ice; that on the morning of January 25, 1888, plaintiff was found, a few minutes after six in the morning, lying insensible at or near this place, which is near the bottom of a slope, by Mr. Squibbs, who was going to his work at the knitting-works, where plaintiff was also employed; that he fell twice, within 10 feet, in going up to her; that he and two young women of her acquaintance restored her to consciousness, and on recovering consciousness she made an exclamation of suffering; that this was the only slippery place on the way to the works. They aided her to walk home. From plaintiff's account, she fell very shortly before she was found. Her testimony indicates that the injury chiefly affected her right arm and shoulder, and was continuously painful, and thereby interfered with the free use of the arm. There was medical testimony indicating an injury to the collar-bone, and to the shoulder. Examinations were made at different times, and the medical witnesses for plaintiff and defendant did not agree upon the appearance of the collar-bone and shoulder. The medical witness for defendant claimed there were no signs of any permanent mischief, and differed in some of his medical opinions. There was testimony concerning the condition and work of plaintiff before and after. There was also some testimony that after a sickness, when she was a child, plaintiff was weak in mind and body, and especially in her right arm, which they intimated was paralyzed. There was no testimony of present mental weakness or paralysis; and the medical testimony all bore on the local conditions of the shoulder and adjacent parts, and the presence of pain in moving the arm, and the effect on the muscles of strains and other local injuries. All agreed that there was no withering or shrinking of the arm, and the defendant's medical witness testified that the arm was in normal shape and appearance.

Only two errors are relied on here. One is that plaintiff made no case to go to the jury. The other is that the declaration is insufficient in one phase of the case which defendant asked to have before the jury. As the icy condition of the walk was not the result of neglect to remove naturally-accruing ice and snow, but was caused by the action of defendant in throwing water on the place where it froze, we think the case was a proper one for the jury. There is no proof that plaintiff was in fault in going where she went.

The other assignment is for the refusal of the court to give

Negligence—
Ice upon sidewalk.

a specific charge. There is no error assigned on any charge actually given. The court actually charged the jury on the point involved in this manner: "If you shall find that the physical condition of this plaintiff had been impaired before the time of the alleged injury, or if she was not in perfect health, and in the full, free, and unimpaired use of her arm

Damages—
Injury from
accident—
Previous in-
firmity.

and shoulder, or, in other words, if she was not in perfect physical condition at the time of the alleged injury, then, gentlemen, you must closely scrutinize the testimony bearing upon her after and present, as well as her prospective, physical condition; and if her past or present condition, or prospective condition, should or shall be owing in whole or in part to such prior condition, then, gentlemen, there can be no recovery for either pain, suffering, or loss of time so occasioned by such former physical condition, or any of its natural results." Further instructions were carefully given, to the same effect, as to discriminations. The request made before the charge, and refused, except so far as covered by what is above referred to, was this: "(1) The defendant has given evidence which tended to prove that the plaintiff, when a child, suffered severe illness, and that illness left her right arm disabled and infirm; and its theory is that the advisability with which the plaintiff has suffered since the accident in question was not caused by the accident. If the jury believe from the evidence that the plaintiff's right arm and shoulder were weak and disabled before the accident in question, and as the result of said sickness, then she cannot recover, under the declaration and evidence in this cause, for such disability, or any aggravation of the same produced by the accident in question." This request is supposed to be sustained by the opinion in *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. —, 41 N. W. Rep. 490. In that case the principal damage alleged to plaintiff was that by the injury complained of, which was the fall of part of a roof, his brain was injured, his body paralyzed, and his internal organs so injured that he has been paralyzed and subject to fits. There were allegations of other bodily sufferings, which it was not disputed were properly charged and proved. The only questions leading to comment were concerning epilepsy and paralysis. The court allowed the jury, there being proof of previous epilepsy and paralysis, to give damages for the aggravation of both. This court held that the declaration fairly alleged the paralysis and epilepsy to have been caused, and not merely aggravated, by the injury, and that this was such a variance as would prevent recovery for those causes. We cannot see the pertinency of this objection. The proof in the present case showed the injury ex-

actly as described; and the declaration claimed, and this proof showed, nothing more than was to be gathered from that injury. The declaration did not directly or inferentially set up any state of things inconsistent with the proofs relied on. There is no necessary inference that the plaintiff, before the injury, was robust or weak, sound or unsound. There was no direct proof in the case that at the time of this accident plaintiff was paralyzed or afflicted with any permanent defect or injury due to such paralysis, and not caused by the accident. The medical testimony, which, on such a subject, is the only safe reliance, is harmonious on both sides on this point, and contradicts any such influence. Paralysis and epilepsy are permanent and increasing disorders, which, if caused by the accident in question in the Wilkinson Case, would have been the entire ruin of the plaintiff, due to defendant's wrong. If the injury did not produce them, it would entirely change the main issue. The declaration in the present case charges no abnormal change of condition, but no more than might happen from any serious injury to the upper shoulder and arm of a sick or well person. In such an issue it is a mere matter of degree and extent, and such a question as must always be applied with reference to existing conditions. The testimony set up here in the request had no tendency to deny any of the actual injuries relied on, whereas in the Wilkinson Case it changed the issue entirely as to the principal damage. There is no variance at all between the case charged and the case made, and there is no rule of law which will prevent a plaintiff from recovering whatever pertinent testimony shows she ought to recover. The judgment should be affirmed, with costs.

SHERWOOD, C. J., and MORSE and LONG, JJ., concurred with CAMPBELL, J.

CHAMPLIN, J., (*dissenting*).—In this case the plaintiff's right of recovery depends upon the facts alleged in her declaration, and put in issue by the plea. She alleges that she was passing along a sidewalk in a public street, and stepped upon some ice caused by water escaping from defendant's tank and pipe, whereby the place was made slippery, and she slipped and fell upon the sidewalk and ice, and by said fall was greatly injured; that her head, shoulder and side were severely cut and bruised, her collar-bone was broken, and she received permanent injuries, and her health was and is permanently injured; and by reason of which injuries the plaintiff became, and is, and for a long time will be, lame and sick, and has suffered great bodily pain, and has been disabled from at-

Facts.

tending to her business for six months and more, and incurred an expense for medical attendance and nursing of \$200. There is no count in the declaration alleging that she was at the time afflicted with any disease, malady, or infirmity whatever which the injury she received from her fall tended to aggravate or make worse; but, on the contrary, whatever her injuries were, they were caused by the fall she got through the defendant's negligence. The testimony introduced by her was exclusively directed to sustain the issue so made by her. The defendant, by a cross-examination of the plaintiff's own witnesses, and by other positive and direct testimony, introduced evidence which tended to show that the injury complained of, and the effect which the plaintiff claimed was produced solely by her fall upon the sidewalk, had existed for a long time prior to the accident; and, based upon this testimony, counsel for defendant requested the court to instruct the jury as follows: "The defendant has given evidence which tended to prove that the plaintiff, when a child, suffered severe illness, and that illness left her right arm disabled and infirm; and its theory is that the disability with which the plaintiff has suffered since the accident in question was not caused by the accident. If the jury believed from the evidence that the plaintiff's right arm and shoulder were weak and disabled before the accident in question, and as the result of said sickness, then she cannot recover, under the declaration and evidence in this cause, for such disability, or any aggravation of the same produced by the accident in question." The court refused to give this request, and counsel for defendant excepted.

Upon the declaration, the testimony, and the theory of the defendant, I think the latter part of this request should have been given. It would have been proper for the court to instruct the jury that the defendant had "given evidence which tended to prove" certain facts. But the testimony was introduced for the purpose of proving, and which, if believed, tended to prove certain facts. The issue and the testimony, however, fairly called upon the court to instruct the jury that if they found from the testimony that the plaintiff, prior to the time of her falling upon the sidewalk, had, as the result of physical infirmity, a weak shoulder and arm, which she now claims was caused by her fall, she could not recover, under her declaration, damages resulting from such existing infirmity, nor for any aggravation of an existing infirmity resulting from her falling upon the sidewalk at the time, place, and under the circumstances, stated in her declaration. He did instruct them that she could not recover any damages resulting from ex-

Damages—
Previous infirmity.

isting infirmities, and only such damages "as was, is, or will be the natural and direct result of the accident, aside from her past condition." This would authorize the jury to include damages for aggravation of existing infirmities. We have held that the plaintiff must be confined to the cause and consequences alleged in the declaration. *Thurstin v. Luce*, 61 Mich. 292; *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. —, 41 N. W. Rep. 490. And where it is developed upon the trial that the infirmity alleged might, if the testimony be believed, have existed prior to the alleged cause, and no claim is made in the declaration that the malady was aggravated by the accident, the defendant is entitled to an instruction that damages for the aggravation of existing physical infirmities cannot be recovered in the action. For the error pointed out, I think the judgment should be reversed, and a new trial ordered.

PENNSYLVANIA R. CO.

v.

AIKEN.

(*Pennsylvania Supreme Court, November 11, 1889.*)

Contributory Negligence—Crossing Track in Front of Approaching Train.—

In an action for damages for negligently causing the death of plaintiff's husband, it appeared that the deceased and a companion attempted to cross defendant's road at a point at which there were 10 or 11 tracks at grade occupying a space of 150 feet. The view was obstructed on one side by standing cars and piles of material, and on the other by a train, the engine of which was blowing off steam. The deceased and his companion walked on without stopping until they had crossed 6 or 7 tracks when they saw an approaching train. From the track which they had just crossed to the track on which the train was, there was a clear space of 12 feet. Deceased's companion testified that he said to the deceased, "You had better stop." The deceased replied, "Come on; we can get across." The witness also testified that he attempted to cross, and by the time he was at the track he could lay his hand on the engine. *Held*, that the accident was caused by the deceased's contributory negligence, and there could be no recovery.

Same—Duty to Stop, Look and Listen—Foot Travellers.—The rule that a person before crossing a railroad must stop, look and listen, applies equally to persons walking as to persons driving, and a failure to stop is not merely evidence of negligence, but is negligence *per se*.

Same—Evidence—Usual Speed of Trains.—Evidence as to the speed at which trains usually ran over the crossing was irrelevant, and an objection thereto was not obviated by testimony that the train was going about the usual rate of speed.

ERROR to Court of Common Pleas, Allegheny County.

Trespass for negligently causing the death of plaintiff's husband. The defendant brings error to review a verdict and judgment for the plaintiff.

John H. Hampton, William Scott and George B. Gordon for plaintiff in error.

J. W. Kirker for defendant in error.

MITCHELL, J.—This is a perfectly clear case of contributory negligence, unrelieved by any circumstance which the jury should have been allowed to consider as an excuse for violation of the plainest dictates of prudence and the settled rules of law. The deceased, at 9 o'clock on a rather dark night in January, was walking along Penn avenue, in the borough of Wilkesburg, and came to the railroad, which at that point had then 10 or 11 tracks at grade, occupying a space of about 150 feet. It was intrinsically a dangerous place, and at the particular time was made more than usually so by standing cars and piles of pipe and railroad ties which obstructed the view on one side, and on the other side a train on one of the tracks, with an engine blowing off steam. In the face of these manifest dangers, the deceased and his companion walked straight on, without stopping, until they had crossed 6 or 7 tracks, when they saw an approaching train. At this moment they were either on a spur track that ends a few feet beyond the crossing, or between it and the first passenger track, on which the train was coming. Counting the spur tracks as safe, they had a space of 45 feet of actual safety in which to wait the passage of the train; but as there is no evidence that they knew that the so called spur tracks were not ordinary tracks, liable to be used at any time, it is hardly proper to charge them with the knowledge. But from the nearest spur track which they were on, or had just crossed, to the passenger track on which the train was, there was a clear space of 12 feet, in which deceased might have waited in safety, and in which, fortunately for himself, his companion did wait. From this point I take the narrative in the language of Irvin, the deceased's companion: "When we come to the track, we noticed a train coming. *Question.* That is, to the main track? *Answer.* Yes, sir; and it was pretty close before we seen it; and Mr. Aiken attempted to go on, and I stopped. I said: 'We had better stop;' and he says, 'Come on; we can get across;' and he started, and I stopped. I had attempted to get across, and by the time I was at the track I could lay my hand on the engine."

None of these facts were in the slightest doubt, for the evi-

dence was in behalf of the plaintiff, and was that of the only witness who saw the accident. It is therefore indisputable that the deceased saw the train while he was in a place of safety, and voluntarily took the chances of crossing in front of it. In the face of this patent fact, the other circumstances—the danger of the place, the rate of speed of the train, the absence of warning, the obstructions to sight and hearing, etc.—became totally unimportant, and the plaintiff should have been nonsuited, or a verdict directed against her.

Accident
caused by
plaintiff's
negligence.

The learned counsel for the defendant in error has endeavored to assimilate this case to *Pennsylvania R. Co. v. Werner*, 89 Pa. St. 59; but there is a marked and insuperable line of distinction between them. That was said by our Brother STERRETT, in his opinion, to be a close case; but, in laying down the rule that a man in a position of danger is not responsible for a mistake of judgment in getting out, he was careful to add the explicit qualification that he must have got into the danger without negligence or fault of his own. Keeping this qualification in mind, that case was the logical sequence of *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357. But in the present case the essential premise is wanting. Aiken not only walked into the dangerous position without any of the precautions which the situation required, but, when confronted with the actual emergency, had his attention called by his companion to the danger imminent; and his reply, "Come on; we can get across,"—does not indicate a man who was confused, and in doubt what to do, but one who saw the risk and chose to encounter it.

In the portion of the charge contained in the fifth specification of error, the learned judge said to the jury that, "ordinarily, the rule of law is * * * that a man, before crossing a railroad track, must stop, look and listen. * * * I think that is usually applied, however, to parties who are driving, and not to parties walking. It is, after all, not a rule of law, but a rule of evidence only; and therefore the duty of stopping is always a question for the jury." This was clear error. The rule as to stopping applies equally to persons walking as to persons driving. There is no distinction, in the nature of things, except of degree, as to danger and none is recognized in the cases. *Nagle v. Allegheny Val. R. Co.* 88 Pa. St. 35; *Carroll v. Railroad Co.* 12 Wkly. Notes Cas. 348; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430; *Marland v. Pittsburgh & L. E. R. Co.*, 123 Pa. St. 487. It is made quite as much for the safety and protection of passengers on the train as of passengers on the highway; and the stopping is an es-

Crossing
track—Duty
to stop, look
and listen.

sential part of the rule to enforce attention to the accompanying duties of looking and listening, and to secure their performance in something more than a perfunctory and heedless way; in fact, to prevent the very thing which cost this unfortunate man his life. Irvin was asked: "Could you hear the train until you got past these obstructions?" *Answer.* Possibly we might have, if we had been paying particular attention. We were talking, and I didn't notice. It is not a rule of evidence, but a rule of law, peremptory, absolute, and unbending; and the jury can never be permitted to ignore it, to evade it, or to pare it away by distinctions and exceptions. That failure to stop is not merely evidence of negligence, but negligence *per se*, has been said so often, from North Pa. R. Co. *v.* Heileman, 49 Pa. St. 60, to Greenwood *v.* Philadelphia, W. & B. R. Co., 124 Pa. St. 572, that to cite the cases would be wearisome.

The evidence in the sixth assignment, relative to the speed at which trains usually ran over this crossing, was irrelevant, and tended to divert the attention of the jury from the particular case to the general condition of danger at this crossing. This objection was not obviated by the testimony of Irvin that he thought the train was going "about the usual rate of speed." The assignments of error must be sustained. Judgment reversed.

Evidence as to speed.

BAIN, State Treasurer,

v.

RICHMOND & DANVILLE R. Co.

(*North Carolina Supreme Court, March 17, 1890.*)

Taxation of Rolling Stock—Foreign Corporation—Interstate Commerce.—A tax levied upon the rolling stock of a foreign corporation which is used for purposes of traffic between two states, violates the provision of the Federal constitution conferring upon congress the power to regulate commerce among the states, and is invalid.

APPEAL from Superior Court, Wake County.

The Attorney General and R. H. Battle for appellant.

D. Schenck and C. M. Busbee for appellee.

MERRIMON, C. J.—The plaintiff is the treasurer of North Carolina. The defendant is a corporation of the state of Virginia, and has a lease of the railroad of the North Carolina Railroad Company, a corporation of this state; and it does the business of transportation in, through, and across this state from the state of Virginia and other states to the

state of South Carolina and other states. The purpose of this action is to recover the sum of \$350 as taxes alleged to be due this state from the defendant, and for costs. The following are the facts found by the court below, and its judgment thereupon: "(1) The Richmond & Danville Railroad Company was, on June 1, 1888, the owner of \$17,500 worth of rolling stock, to-wit, four switching engines, and one coach, which were on June 1, 1888, used exclusively in North Carolina, but owned in Virginia, and which the company never at any time recall. (2) Upon all the rolling stock of the Richmond & Danville Railroad Company the company is assessed for taxation, and does pay taxes in Virginia. (3) The rolling stock of the North Carolina Railroad Company is used exclusively in North Carolina; and upon all this rolling stock, of the assessed value of \$125,000, taxes are assessed and paid in North Carolina by the Richmond & Danville Railroad Company, the lessee. (4) The board of appraisers and assessors of the North Carolina Railroad made the assessment, as set out as an exhibit to complaint, of \$175,000 upon the rolling stock of the Richmond & Danville Railroad Company in use in North Carolina on June 1, 1888. (5) On June 1, 1888, there was in use on the North Carolina Railroad, leased by the Richmond & Danville Railroad in North Carolina, rolling stock passing through the state to the value of \$175,000. Such rolling stock was owned by the Richmond & Danville Railroad Company; and the trains in which said rolling stock was used were made up outside of North Carolina, and went on through to the state of South Carolina. Upon this state of facts, his honor ruled that the defendant company was liable to pay taxes to the state upon \$17,500, on the engines and coach used exclusively in North Carolina, and was not liable to pay upon \$157,500, the remainder, used in interstate commerce. Therefore, it is adjudged that the plaintiff recover of the defendant the sum of thirty-five dollars, and interest from July 1, 1888, and costs."

Facts.

The power and right of the state to tax property of non-residents, whether these be natural or artificial persons, having its *situs* within the state for the purposes of business, convenience, or pleasure of the owners thereof or others, is too well settled to admit of serious question. This important right of the state is surely founded upon the just ground that such property has the protection, advantage, and benefit of the laws of the state; and it ought, on that account, to be required to contribute as taxes its fair share towards the support of the government whose benefits extend to it, not mere-

Power of state to tax property of non-residents.

ly casually, but regularly and continuously, while it continues to be so located, as to other like property of residents of the state. Upon principles of common justice, every property owner should contribute to the support of the government that protects and renders his property valuable and useful his fair proportion of money as a consideration therefor, unless for some proper cause he is excused from doing so. *Alvany v. Powell*, 2 Jones (N. Car.), Eq. 51; *Redmond v. Rutherford Co. Com'rs*, 87 N. Car. 122, and numerous cases there cited; *Worth v. Ashe Co. Com'rs*, 90 N. Car. 409; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 13 Am. & Eng. Corp. Cas. 365; *Thomson v. Pacific R. Co.*, 9 Wall. (U. S.), 579; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.), 5; *Western Union Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 21 Am. & Eng. Corp. Cas. 13; *Leloup v. Port of Mobile*, 127 U. S. 640, 21 Am. & Eng. Corp. Cas. 26. If the state were absolutely sovereign in all respects, it might tax property coming into it temporarily from another state for the purposes of trade, or property passing across its territory from one state to another or other states in the course of trade, travel, and commerce. It might tax such trade and travel, in the discretion of its legislature. But, as a member and constituent part of the Federal Union, it does not possess unlimited powers of taxation as to all property, matters, and things that might otherwise be deemed and made subjects thereof. It and its authorities, including its courts of justice, are bound by that constitution; and it is its and their duty to observe, administer, and enforce its provisions in proper cases and connections,—as much so as its own constitution and laws. Indeed, the constitution of the United States is a part of the organic law of this state; and, in principle and theory, there is not, and cannot be, any conflict between the constitution and laws of the United States and the same of this state. If conflict, in fact, exists in any respect, as, unhappily, is sometimes the case, it is so because those who determine what the law is, administer and enforce it, are ignorant of or misapprehend its true meaning and application, or willfully disregard and disobey it.

A leading and very important purpose of the federal Union was to establish and secure the freedom of trade and commerce, both foreign and domestic, and particularly, for the present purpose, between and among the several states comprising it. To this end, it is provided in its constitution (article 1, § 8, par. 3), that "the congress shall have power * * * to regulate commerce with foreign nations and among the several states, and with the Indian tribes." The power thus con-

Power of congress to regulate interstate commerce.

ferred is indefinite as to its scope, and capable of very latitudinous interpretation and exercise, particularly as it is part of the organic law, and the subject to which it relates, is one of great breadth and compass. It is difficult to determine its just limit in many respects; but it should receive a reasonable interpretation, such as will effectuate the purpose contemplated, trenching as little as practicable upon the powers, rights, and convenience of the states. Very certainly the provision implies that congress should regulate such commerce, and the states shall not; that congress shall do so effectually, in such way and by such means as will secure, promote, and encourage the same, and that the states shall not, if disposed to do so, interfere with, destroy, hinder, or delay the same, or divert it in any way, by any legal constraint, for their own advantage, otherwise than to a very limited extent, as allowed by the constitution. Hence, it is settled that a state cannot tax commerce, trade, travel, transportation, or the privilege to carry on and conduct the same, or the vehicles, means, and appliances employed and used in connection therewith, coming into that state from another temporarily, however frequently, and returning to such other state; nor can it tax such commerce, or such incidents thereto, passing across it from another or other states to another or other states, however often this may be done. And the reason is that to so tax such commerce, and the incidents thereto, including such means of transportation, would tend directly and have the effect, in a greater or less degree and extent, to interfere with the freedom of commerce among and between the people of the states. It would have the certain effect to embarrass, hinder, and delay the free course of such trade. If a state could thus tax such commerce at all, it might, in its discretion, for its own benefit and advantage, tax it so heavily as to practically destroy it within its own borders, and in possible cases prevent it from passing freely into other states. Moreover, if one state might tax it, every state through which it passed might do so likewise; and thus the power of congress to regulate interstate trade and commerce would be nugatory, and a sheer mockery. It is clear that a state has no such power, and the supreme court of the United States has authoritatively so decided, directly and in effect, in many cases. *Hays v. Southern Mail SS. Co.*, 17 How. (U. S.), 596; *Morgan v. Parham*, 16 Wall. (U. S.), 471; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 13 Am. & Eng. Corp. Cas. 365, and numerous cases there cited; 4 *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 24 Am. & Eng. R. Cas. 511; *Leloup v. Port of Mobile*, 127 U. S. 640, 21 Am. & Eng. Corp. Cas. 26.

The statute, (Acts N. C. 1887, chap. 137, §§ 44-51,) properly interpreted, does not, and was not intended to, embrace and tax the property of the defendant put in question by this appeal. It had reference to, and embraced property of, corporations, whether resident or not, whose property was situated—had a *situs*—in this state, and was thus subject to be taxed. But the property in question was not, in a legal sense, located—situated—in this state. It had no *situs* here. It was the property of a non-resident corporation, employed and used by it, constantly, for the purposes of transportation, in the course of the conduct of interstate trade and commerce coming into and passing across this state, from another and other states to and into another and other states. It was not stationary, but constantly *in transitu* from one state to another. The mere fact that property of the defendant of the value mentioned was continuously within the state did not give it a *situs* here. It was continually changing and *in transitu* in the course of interstate commerce. It was so continuously in the state, day and night, because of the great volume of trade and travel passing over the defendant's road into and across this state, going to other states.

It is true, as suggested on the argument, that such property receives protection from this state, and has benefit of its laws; but, nevertheless, it is not the subject of taxation, because the constitution of the United States will not, as we have seen, allow it to be made such subject. Judgment affirmed.

Taxation of Rolling Stock.—See *Atlantic & P. R. Co. v. Yavapai County* (Ariz.), 39 Am. & Eng. R. Cas. 543; *Atlantic & P. R. Co. v. Lesueur* (Ariz.), 37 *Id.* 368, note 374; *Fargo v. Auditor General* (Mich.), 22 *Id.* 216; *Baltimore & O. R. Co. v. Allen* (C. C.), 17 *Id.* 461, note 466; notes 33 *Id.* 448, 486, 24 *Id.* 626, 627.

Taxation of Sleeping Cars.—The carriage of passengers from one state to another in sleeping cars, is interstate commerce, and cannot be regulated or taxed by a state. Appeal Tax Court of Baltimore *v. Pullman Palace Car Co.*, 50 Md. 452. The fare paid by an interstate passenger to the railroad company and the sleeping car fare added together, are merely a charge for his convenience in a particular way, and there is really but one charge for the transit though the total amount paid is divided between two recipients. The service is a single service with certain accommodations for comfort, and what is paid to the car company is a part of the charge for the convenience of the passenger. *Pickard v. Pullman Southern Car Co.* (U. S.), 24 Am. & Eng. R. Cas. 511. In *Attorney-General v. London & N. W. R. Co.*, L. R., 6 Q. B. Div. 216, 1 Am. & Eng. R. Cas. 578, affirming L. R., 5 Ex. Ch. Div. 247, the railroad company attached to its night trains, sleeping cars for the accommodation of such of its first class passengers as might choose to avail themselves of them. For the use of these cars they were charged an extra sum in addition to the ordinary first class fare. Besides couches, with pillows, sheets and blankets, each carriage contained

a lavatory and other conveniences. Passengers using such car were not disturbed during the night by demands for their tickets; and if they arrived at their destination in the night, they were allowed to remain in their beds until morning. Under a statute imposing a percentage "upon all sums received or charged for the hire, fare, or conveyance of passengers" on any railway, the government claimed and was allowed the duty on the extra sum charged for the use of the sleeping car. Lord COLERIDGE said: "We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second-class carriage over a third, or by a first-class carriage over both. If the company issued tickets to all passengers alike at the price charged to passengers travelling in third-class carriages, and then issued tickets at corresponding prices to those desiring to travel in a higher class of carriage, it could hardly be contended that duty would not be payable upon the prices paid for such second ticket. The passenger who is content to travel in a third-class or second-class carriage in the day might well desire to travel in a carriage of a higher class by night; and, in like manner, a passenger ordinarily travelling by day in a first-class carriage might desire the additional accommodation of a sleeping carriage. No separate charge is made in the present case. The charge, though written on a separate ticket, is, in our opinion, part of one charge for the conveyance of the passenger in a particular way, and is, therefore, a part of the charge for the conveyance of a passenger received and charged for such conveyance."

A statute which imposes upon all foreign railroad companies, conveying to, from, or through the state, or any part of it, passengers in drawing room or sleeping cars, a tax at a certain rate per hundred dollars of its gross receipts, the amount of gross receipts taxable being ascertained by taking such a part thereof as will bear the same proportion to the whole amount of its receipts earned, both within and without the state, as the number of miles traversed within the state bears to the whole distance paid for, is unconstitutional, because it is an attempt to tax property situated in another state, and also a regulation of interstate commerce. *Indiana v. Pullman Palace Car Co.* (C. C.), 13 Am. & Eng. R. Cas. 307.

When sleeping cars are employed in interstate traffic, no occupation tax can be levied upon the company for the privilege of running the cars within the state. *Pickard v. Pullman Southern Car Co.* (U. S.), 24 Am. & Eng. R. Cas. 511; *Pullman Southern Car Co. v. Nolan* (C. C.), 17 *Id.* 398. Accordingly a Tennessee statute which imposed a privilege tax of \$50 per annum on every sleeping car or coach used or run over a railroad in Tennessee and not owned by the railroad on which it is run or used, was held to be void so far as it applied to the interstate transportation of passengers carried over railroads in Tennessee, into, out of, or across that state, in sleeping cars owned by a corporation of Kentucky and leased by it for transportation purposes to Tennessee railroad companies. *Pickard v. Pullman Southern Car Co.* (U. S.), 24 Am. & Eng. R. Cas. 511. In *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587, a contrary view was adopted and it was held, that the privilege tax levied under the Tennessee statute as to such of the cars as passed and repassed through the state and did not abide in it, was not amenable to the objection that it interfered with interstate commerce. The view taken was that the property of the foreign corporation used in Tennessee could be taxed as property, or by an excise on its use, and that the tax in this case was not directly on the object of commerce, or directly aimed at commerce. In *Pickard v. Pullman Southern Car Co.* (U. S.), 24 Am. & Eng. R. Cas. 511, the court referred to and dissented from this decision, and as it relates to a subject within the jurisdiction of the federal supreme court, it must now be regarded as overruled.

A Texas statute imposed on "every firm, person, or association of per-

sons owning or running any palace, sleeping or dining-room car not owned by a railroad company in this state" an annual tax of \$2 per mile. It was held that the tax so levied was an occupation tax; that under the provision of the Texas constitution which declares that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax," the tax imposed could not be sustained in that no tax was assessed upon railroad companies which owned and operated their own sleeping cars, and no reasonable distinction could be made between cars owned and operated by the railroads and cars owned by other persons and operated by them. *Pullman Palace Car Co. v. State* (Tex.), 29 Am. & Eng. R. Cas. 194.

By the usual contract of the Pullman Palace Car Co., the railroad company is required to keep the cars in good running order and repair, and to bear such running expenses, including light, fuel, lubricating material and ice, and also to bear the expense of all repairs rendered necessary by accident and casualty. The Pullman Co. agrees to provide the cars; keep the carpets, upholstery and bedding in good cleanly condition; furnish necessary employes to preserve order in the cars; collect berth and couch fares, and take proper charge and care of the inside of the cars. It also agrees to furnish to the railroad company for a term of 15 years a sufficient number of cars to meet the requirements of travel over all lines of railway owned or operated by the railroad company. *Held*, that the possession, control, and community of interest which the railroad company has and exercises, gives the sleeping cars the same *situs* for taxation as articles of the same class owned by the railroad company. *Carlisle v. Pullman Palace Car Co.*, 8 Colo. 320. Under this contract, although the general property in the cars is in the Pullman Palace Car Co., the railroad company has a community of interest in them for the time being, and they are to be deemed as "belonging" to it for the purposes of taxation. *Kennedy v. St. Louis, V. & T. H. R. Co.*, 62 Ill. 395. On the other hand, where by a Missouri statute, it was provided that all railroads in that state "and all other property, real, personal or mixed, owned by any railroad or corporation in this state" should be assessed and taxed in the method prescribed by the act, it was held that under this statute, cars belonging to the Pullman Palace Car Co., were not owned by the railroad within the meaning of the statute, and were not to be assessed against it. *State v. St. Louis County* (Mo.), 29 Am. & Eng. R. Cas. 192.

Under a statute which requires railroad officials to make full returns of all the property, real and personal, "owned," "belonging to" and "used" by railroad corporations in the operation of their roads, and authorizes the county officials to assess the real estate together with the improvements thereon, but not including any portion of the road itself situated in their respective counties, and the state board of equalization to assess the remainder of the property owned and used by the railways, the entire road within the state with all the rolling stock and personal property of every kind including sleeping cars operated by the company under the usual Pullman Palace Car contract is to be assessed as a whole. *Carlisle v. Pullman Palace Car Co.*, 8 Colo. 320.

Under a statute which requires the return "of the rolling stock in use on the corporation's line, which is necessary for the transportation of freight and passengers," all rolling stock used by a railroad company must be presumed to be necessary for the operation of the road, and it cannot be objected that sleeping cars, being in the nature of a luxury, may be excluded. *Carlisle v. Pullman Palace Car Co.*, 8 Colo. 320.

A statute of Wisconsin required the owners of drawing, palace and sleeping cars to return annually to the railroad commissioner a "statement of the gross earnings made by the use of such cars between points within the

state of Wisconsin," and to pay a license fee of two per cent. upon such earnings. *Held*, that the statute only required a statement to be returned of the earnings derived from the use of such cars in transporting passengers, who both got on and off at points within the state. The court did not decide whether the statute if otherwise construed, would have been unconstitutional. *State v. Pullman Palace Car Co.*, 64 Wis. 89.

STATE *ex rel.* TRAMMEL, Collector, etc.,

v.

HANNIBAL & ST. JOSEPH R. CO.

(*Missouri Supreme Court, June 10, 1889.*)

Taxation—Description of Property—Sufficiency—Pleading.—Under the Missouri statute which makes it the duty of the board of equalization to assess each railroad in its entire length, including branches, side-tracks, rolling-stock and fixtures, and to apportion the aggregate value to each city, county or town according to the ratio which the number of miles therein bears to the whole length of road in the state, it is contemplated that the property will be assessed by designating the number of miles of road in every county, township and municipal corporation; and the assessment need not describe the property otherwise than as so many miles of a given value with a proportion of the value of the rolling-stock therein. A petition to enforce the tax need not be more specific than the assessment, and is sufficient if it sets out the number of miles of road in a county with the assessed value of road and rolling stock.

Same—Pleading—Number of Miles in Township.—It is not necessary that the number of miles in a certain township should be stated in the petition though it is in the assessment, if the petition states the amount of the railroad tax levied in the township on defendant's property.

Same—Adoption of Township Organization by County.—In such petition it need not be stated that the county had adopted the township organization, the adoption of such organization being immaterial so far as the validity of a township bond tax is concerned.

Same—Exemption from County Taxes—Acceptance of Land Grant.—A provision in a charter which declares that the stock of a railroad company shall be exempt from state and county taxes, is not, so far as the county tax is concerned, affected by a subsequent statute granting lands to the corporation and accepted by it, which provides that the company shall each year "pay into the treasury of the state a sum of money equal to the amount of state tax on other real and personal property of like value for that year, upon the actual value of the roadbed * * * and other property of said company."

Same—What are County Taxes—Tax for Payment of Subscription to Stock.—A tax levied to pay the bonds of a county given in payment of a subscription to railroad stock, is a county tax although the bonds can only be paid out of a tax levied for the special purpose imposed by virtue of a provision in the charter of the railroad company.

Same—Power of County to Compromise Bonds—Conflicting Decisions.—The state courts having held the Missouri "Township Aid Act" to be unconstitutional, while the federal circuit courts have sustained the constitution-

ality of the act, bonds issued pursuant to such act, are proper subjects of compromise under a statute authorizing the various counties for themselves and on behalf of any township therein to make contracts for the compromise, purchase, or redemption of bonds, and to issue new bonds for such purpose, and a tax levied for the payment of bonds issued in terms of a compromise is valid.

Same—Exemption from County Taxes—Township Tax.—A provision in a charter exempting a company from the payment of county taxes, does not apply to municipal taxes, and a tax levied only on the property of a particular township for the payment of township aid bonds is not included in such exemption.

Same—Levy of Omitted Taxes—Presumption.—Where the order of a county court levying county taxes recites that the special taxes to pay township bonds were omitted for certain designated years and then orders the clerk of a county court to extend such taxes on the county tax books, the recital is *prima facie* evidence that the taxes have been omitted, and it is not necessary for the plaintiff in an action to enforce the payment of the taxes, to introduce the levy for the years for which the omitted taxes are assessed made upon property other than railroad property, and until evidence to the contrary is offered, it will be presumed that the rate levied on other property for the same years was that specified in such order.

Same—Levy at Regular Term of County Court—Adjournments.—Under a statute which provides that taxes against railroad property shall be levied "at a regular term" of the county court, when a county court opens a stated term and adjourns from day to day, or for a number of days, such adjournments are but a part of the regular term, and a tax may be levied at any of these adjourned sessions.

Same—Validity of Levy—Presumption of Regularity.—The county court being the only court which has the power to levy taxes for payment of township aid bonds, when a levy is shown, it will be presumed that the county circuit court made an order directing the county court to levy a tax to pay the bonds as required by statute.

APPEAL from Circuit Court, Macon County.

On motion for rehearing. The opinion rendered by the court upon the previous hearing is reported in 39 Am. & Eng. R. Cas. 548.

Strong & Mossman for appellant.

B. R. Dysart, John F. Mitchell, and Seers & Guthrie for respondent.

BLACK, J.—This is a suit by the collector of Macon county, in the name of the state, to recover state, county, school, municipal and township taxes for various years.

Facts. The defendant made a tender of the amount it believed to be due for state, school, and city and town taxes, which was accepted as to the school tax; and the court found the amount tendered for state, city, and county taxes to be the amount due. The tender was deposited with the clerk of the circuit court. The plaintiff impliedly conceded that the judgment is erroneous in so far as he recovered what are called "Missouri & Mississippi Railroad Taxes" for the years 1868, '69, and '70; so that the taxes still in dispute

are taxes of the last named description for the years 1871, '72, '77, '78, '79, '80, '82, '83, '84, and '85, amounting to about \$3,000; and what are called "Omaha Railroad Taxes," levied in Hudson township, for the years 1882 to 1885, both inclusive, amounting to \$680. These taxes were all levied on the assessed value of the defendant's property, as made out and certified to the county court by the state board of assessment and equalization of railroad property. The following admissions were made on the trial of this case: That the Missouri & Mississippi Railroad tax, mentioned in the petition, was a tax levied for the purpose of paying the interest and principal of certain bonds issued by the county court of Macon County. That said county, in the year 1867, subscribed for 175 shares of the capital stock of the Missouri & Mississippi Railroad Company, and in 1870 said court again subscribed for 175 shares of the capital stock of said company; and that said bonds were issued by said county in order to pay for the stock of said company issued by said county; and that said county became a stockholder in said company, and took part in the meetings and deliberations of the shareholders as such. That the tax described in the petition as the "Omaha Railroad tax," assessed and levied in Hudson township, was a tax for the purpose of paying the principal and interest on bonds of said county issued by the county court, in pursuance of an act approved March 23, 1868. That under said act the county court had been petitioned by the taxpayers to order an election in relation to subscribing for the stock of the St. Louis & Omaha Air Line Railroad, a corporation organized under the general laws of this state. That an election had been held, and the county court had subscribed \$40,000 of bonds in the name of Hudson township. That the bonds which the tax is levied to pay are funding bonds to take up the above-named bonds; said funding bonds being issued under the general statutes of this state.

1. It is deemed best to notice here some preliminary questions. The defendant insists that the circuit court should have sustained its objection to the introduction of any evidence, because the petition is defective, in this: that it gives no sufficient description of the defendant's property; and in this: that it is not stated that Macon county had adopted township organization, or that there was such a township as Hudson township. There are four counts in the petition, but it will be sufficient to notice the first. It is alleged that defendant was the owner of "thirty-one and 15-100 miles of railroad bed, including side tracks, buildings, and other property in said Macon county of the total value," etc.: "that there were legally assessed

Pleading—
Description
of property.

and levied against said property for 1884, for state, school, municipal, and other purposes, the aggregate sum of \$3,485.97; that the taxes so assessed and levied thereon are now due and unpaid, * * * for Omaha railroad taxes, levied and assessed in Hudson township, in said Macon county, the sum of \$161.32," etc. Section 6889, Rev. St. 1879, gives a form of petitions in these tax suits, and the form contemplates a description of the taxed property. But, in determining what will be a sufficient description, we must look to other sections of the same law. It is made the duty of the state board of equalization to assess the railroad in its entire length, including branches, double and side tracks, depots, water tanks, turn tables, engines, and cars, and to apportion the aggregate value to each county, township, city, or incorporated town according to the ratio which the number of miles in such county, township, city or incorporated town bears to the whole length of the road in this state. Rev. St. Mo. 1879, §§ 6871, 6873. It is apparent that the assessment in each county must be according to the apportioned mileage; and the law contemplates that the property which comes within the jurisdiction of the state board of equalization will be assessed by designating the number of miles of road in each county, township, and municipal corporation. The assessment need not, therefore, describe the property otherwise than as so many miles, of a given value, with the proper proportion of the value of the rolling stock added. The petition need be no more specific than the assessment; and it follows that the description of the property given in the petition in this case is sufficient, for it sets out the number of miles of road in Macon county, with the assessed value of road and rolling stock. It is true that the number of miles in Hudson township is not stated in the petition, though it is in the assessment; nor does the statutory form of the petition require such a statement. The petition does state the amount of the railroad tax levied in Hudson township on defendant's property; and that is sufficient. So far as the validity of this township bond tax is concerned, it is a matter of no importance whether Macon county had or had not adopted township organization.

2. On behalf of the defendant, it is next insisted that the judgment of the circuit court is erroneous in so far as defendant is charged with Missouri & Mississippi Railroad taxes, because they are county taxes; and that the defendant is, by its charter, exempt from the payment of all county taxes. The plaintiff insists that these are not county taxes, within the meaning of the exemption clause of the defendant's charter; and, if it may be called

**Exemption
from county
taxes.**

a "county tax," still the legislature had the power to levy such a tax on the defendant's property, and that it exercised that power in passing article 8, chap. 145, Rev. St. 1879. The act incorporating the Hannibal & St. Joseph Railroad Company gave to it all the privileges, rights, and immunities which were granted to the Louisiana & Columbia Railroad Company. Acts 1846-47, p. 157, § 4. The twenty-fourth section of the act incorporating the last named company provides: "And the stock of said company shall be exempt from state and county taxes." Acts 1836-37, p. 252. The act of September 20, 1852, granting lands to the defendant, which were received by the state under an act of congress to aid in the construction of certain railroads, provides that the defendant shall each year "pay into the treasury of the state a sum of money equal to the amount of the state tax on other real and personal property of like value, for that year, upon the actual value of the roadbed * * * and other property of said company, which shall be as a consideration to the state for the execution of the trust reposed in the state by an act of congress," etc. This act of 1852, which was accepted by the defendant, modified the charter exemption so that the defendant thereafter became liable for taxes for state purposes, the same as like corporations organized under the general law. *State v. Hannibal & St. J. R. Co.*, 60 Mo. 143. But it has been constantly ruled by this court that the property of the company could not be taxed for county purposes, because the act of 1852 in no way affected the charter exemption as to such taxes. *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 550; *State v. Hannibal & St. J. R. Co.*, 37 Mo. 266; *Livingston Co. v. Hannibal & St. J. R. Co.*, 60 Mo., 516. Some language used in the earlier of these cases has led to the argument in this case that the former statutes were not broad and comprehensive enough to include the property of defendant in the subject of county taxation, and that the judgments in those former cases should be regarded as standing on that ground. The case last cited was a suit to recover a county tax and a school tax levied and assessed under the act of March 10, 1871 (Acts 1871, p. 56.) The first section of that act is as broad and comprehensive as language could make it. It is as broad and comprehensive as article 8, chap. 145, Rev. St. 1879, upon which the plaintiff relies. This court then, speaking of the county tax there in suit said the exemption of the road from county taxes had never been rescinded by the act of the parties, and that the demurrer to so much of the petition as claimed a recovery for county taxes was properly sustained. It cannot be, and we believe is not, claimed that the legislature or any constitutional convention could repeal the exemption without the

defendant's consent. If there has been any act on the part of the defendant, such as a sale or consolidation, that can have the effect of depriving the defendant of its charter exemption from the payment of county taxes, that act is not made to appear by this record. There is nothing left for the court to do but to say the defendant is not liable for county taxes.

But the plaintiff says these Missouri & Mississippi Railroad taxes are not county taxes, within the meaning of the defendant's charter exemption. The county became a stockholder in that railroad company, and the bonds of the county were issued to pay for the stock. No other subdivision of the state is under any obligation to pay the debt thus incurred; and, if the

**Tax to pay
subscription
by county is a
county tax.**

tax levied to pay them is not a county tax, then it is difficult to say what kind of a tax it is, when we are speaking of state, county, and other taxes. County taxes are mentioned in the defendant's charter as a class; and the defendant is exempt from the payment of taxes which come within that class. It is true, the thirteenth section of the charter of the Missouri & Mississippi Railroad Company, and under which the bonds were issued, provides for a tax of one-twentieth of 1 per cent. to pay them; but the tax is one levied on all the property in the county not exempt from taxation, and is still a county tax, and cannot be otherwise designated, when speaking of county taxes as a class. The plaintiff places much stress upon a remark made in *Livingston Co. v. Hannibal & St. J. R. Co.*, 60 Mo. 519, where it is said: "In regard to school taxes, they may be considered as originating since the charter; and therefore nothing was said in it concerning them. Like the municipal taxes of St. Joseph, in *St. Joseph v. Hannibal & St. J. R. Co.*, 39 Mo. 476, they may be regarded as not within the exemption." We fail to discover anything in these observations which says that the defendant was exempt only from such county taxes as were levied and collected at the date of the defendant's charter. It is a matter of no consequence when the particular tax was first levied. If it is a county tax, the defendant is exempt from the payment of it.

3. The defendant objects to the Omaha Railroad tax on the ground that the act of March 23, 1868, known as the "Township Aid Act," and under which the original bonds were issued, is a void law. This court has held that the act was unconstitutional, in a number of cases. *Webb v. Lafayette Co.*, 67 Mo. 367; *State v. Walker*, 85 Mo. 44, and cases cited. On the other hand, the United States courts, following *Cass. Co. v. Johnston*, 95 U. S. 365, uphold the act; and bonds issued pursuant to it are, by those courts, held to be valid obligations. Because of this state of

**Compromise
of aid bonds.**

affairs, it was held in *State v. Holladay*, 72 Mo. 499, that such bonds were proper subjects of compromise, under the act of 12th April, 1877. The township bonds now in question are conceded to be funding bonds issued under the general statutes of this state, and, by this, reference must be had to the act of 1879, Laws 1879, p. 47; 2 Rev. St. Mo. 1879, p. 849. That act authorizes the various counties themselves, and for any township therein, to make contracts for the compromise, purchase, or redemption of bonds; and the county courts, under the restriction therein stated, may issue new bonds for such purposes. Following the logical result of that case, and of the case of *Dallas Co. v. Merrill*, 77 Mo. 573, it must follow that these new compromise or funding bonds are valid, and the taxes levied to pay them are valid taxes, if not invalid for some other reason.

4. With the result just reached, the defendant still insists that these township taxes levied to pay township funding bonds are county taxes within the meaning of its charter exemption. It does not appear from this record that Macon county has ever adopted township organization; so we have no occasion to speak of township organization laws. Hudson township, so far as this record shows, is simply a geographical subdivision of the county, without any corporate existence. As the defendant's charter only speaks of state and county taxes, it has been held the exemption never did extend to municipal corporation taxes, such as cities and towns (*City of St. Joseph v. Hannibal & St. J. R. Co.*, 39 Mo. 477;), nor to school taxes (*Livingston Co. v. Hannibal & St. J. R. Co.*, 60 Mo. 518.) School districts, like municipal corporations, do have a corporate existence; and in this respect they differ from townships. But the tax here in question is local, and levied only on the property in the particular township, and in our judgment was not within the contemplation of the legislature when it exempted defendant from the payment of county taxes. It does not fall within that class of taxes.

Exemption—
Liability for
township aid
tax.

5. The order of the county court levying the township taxes for 1882 and 1883 was made on the 2d September, 1884. It recites that the special taxes to pay Hudson township bonds were omitted for the designated years; and it is then ordered that the clerk of the county court extend such taxes on the tax books of the county on property of defendant in said township at the rate of 20 cents on each \$100 valuation; said rate being the same as extended upon other property in said township for said years. These taxes for the omitted years were levied by authority of section 6879, 2 Rev. St. 1879. The plaintiff did not

Levy of omitted taxes—
Validity.

offer any evidence other than the order itself to show that those years had been omitted. The county court, in making the order, must have found, and in point of fact did find, that they had been omitted; and the recital is at least *prima facie* evidence that they had been omitted. For a like reason it was not necessary for the plaintiff, to make out a *prima facie* case, to introduce the levy for those years made upon property other than railroad property. Until some evidence to the contrary is offered, it must be taken as proved that the rate levied on other property for the same years was 20 cents on the \$100 valuation. The point made that the court did not, by the order, levy any tax, is extremely technical. The order does direct the clerk to extend the specified tax at a specified rate upon the tax books for the omitted years; and this, we held, was a good and sufficient levy. We find nothing to the contrary in the case of *City of Kansas v. Hannibal & St. J. R. Co.*, 81 Mo. 294, 22 Am. & Eng. R. Cas. 229.

6. These taxes against railroad property are to be levied after the assessments are returned "at a regular term of said court, if in session at the time, if not, at a special term of said court called for that purpose." Section 6879. When the county court opens a stated term, and adjourns from day to day, or for a number of days, such adjournments are but a part of the regular term, and the tax may be levied at any of these adjourned sessions. The special term mentioned in the clause of the statute just quoted, evidently means a term called pursuant to sections 1207, 1208, Rev. St. 1879; but, when the court adjourns from time to time, the adjourned terms, as they are called, are but parts of the regular term.

It has been suggested in this court that the taxes levied to pay these township funding bonds are void, because it does not appear that the Macon county circuit court ever made an order directing the county court to levy a tax to pay them, as provided by the act of March, 8, 1879 (Acts 1879, p. 185; 2 Rev. St. 1879, § 6799.) Taxes have been held to be invalid because of a non-compliance with that act in a number of cases. *State v. Hannibal & St. J. R. Co.*, 87 Mo. 236; *State v. Missouri Pac. R. Co.*, 92 Mo. 153; *State v. Wabash, St. L. & P. R. Co.*, 97 Mo. 298. But the act has been recently held to be unconstitutional by the supreme court of the United States, so far as concerns bonds issued prior to its passage. *Seibert v. Lewis*, 122 U. S. 284. It is probable that the ruling in that case would not apply to the bonds in question, because they were issued subsequent to date of the act. But, be that as it may, it does not appear whether the circuit court did or did

"Regular
term"—Ad-
jourments.

Order direct-
ing levy of
tax—Pre-
sumption.

not make the order. The county court is the only court which has the power to levy these taxes; and, when a levy is shown, we are of the opinion it should be presumed that the preliminary order had been procured until the contrary is made to appear.

Other objections are made to these taxes levied to pay township bonds, but we cannot pursue them in detail. We are of the opinion they are not well taken. It follows that the judgment is erroneous as to all the Missouri & Mississippi Railroad taxes, and, as they are separately stated in the judgment, it is not necessary to remand the cause. As to all Missouri and Mississippi Railroad taxes, the judgment is reversed, but in all other respects the judgment is affirmed, and a judgment will be entered here in conformity with what has been said. The costs of this appeal will be taxed against the plaintiff below, respondent here. All concur.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

v.

WORTHEN *et al.*

(*Arkansas Supreme Court, February 15, 1890.*)

Taxation—Assessment by Board of Commissioners—Constitutional Law.—A statute which creates the governor, secretary of state and auditor a board of railroad commissioners, and empowers them annually to examine a sworn schedule of railroad property which is required to be filed by persons or corporations owning or operating railroads, and to appraise the value of such property, and certify to the county assessor the value of the portion lying within the county which shall be listed and assessed by the assessor, is not unconstitutional because it employs a different instrumentality for the valuation and assessment of railroad property from that employed for the assessment of other property, although the constitution provides that the value of property assessed for taxation shall be ascertained in such manner as the general assembly shall direct, but shall be equal and uniform throughout the state.

Same—Annual Assessment of Railroads.—Such statute is not invalid because it authorizes the assessment of "railroad tracks"—a term including the right of way, which is real property—annually, whereas other real estate is assessed biennially.

Same—Notice of Meeting of Board.—Where the time and place of meeting of the board of railroad commissioners for the appraisal of railroad property is fixed by statute, the fact that the board meets without notice to the railroad companies, does not render an assessment invalid.

Same—Validity of Statute—Appeal.—Such statute is not unconstitutional because it makes the decision of the board upon the question of value final, and does not provide for an appeal.

APPEAL from Chancery Court, Pulaski County.

Bill by the St. Louis, Iron Mountain & Southern R. Co.

against R. W. Worthen, collector of taxes for Pulaski county, and others, to enjoin the collection of taxes assessed upon the complainant's property. Mansf. Ark. Dig., § 5647 *et seq.*, provide that the governor, secretary of state and auditor shall constitute a board of railroad commissioners; that all railroads doing business in the state shall make and file with the secretary of state a schedule showing the number of miles of track used by them, and the value of the station houses, railroad track, and other improvements on the right of way; that for the purpose of taxation such property shall be classed as real estate and shall be assessed annually; that the board of commissioners shall appraise the railroad track, etc., and certify to the assessor of each county, the value of the portion lying within the county, and that the assessor shall thereupon list and assess the same. The defendants filed a demurrer to the bill upon the ground of want of equity. The demurrer was sustained and the bill was dismissed upon the plaintiff's refusal to amend. The plaintiff appealed.

Dodge & Johnson for appellant.

W. E. Atkinson, Atty. Gen., for appellee.

COCKRILL, C. J.—This appeal raises the question of the constitutionality of the provisions of the revenue act of 1883, creating the state board of railroad commissioners for the assessment of railway property for taxation. Section 5647 *et seq.*, Mansf. Dig. It is an attempt to enjoin the collection of the taxes on account of the alleged invalidity or nullity of the assessment. The legality of the proceedings of the board in assessing railway property was affirmed by this court in the case of *Little Rock & Ft. S. R. Co. v. Worthen*, 46 Ark. 312, and by the supreme court of the United States in *Huntington v. Worthen*, 120 U. S. 97, 29 Am. & Eng. R. Cas. 230; and thus the constitutionality of the act creating the board was impliedly recognized by both tribunals. But the question was not argued in either case, and we are now asked to overthrow the act because (1) it authorizes the assessment of railways by a different instrumentality from that employed to assess other property; because (2) it authorizes the assessment of "railway tracks"—a term which includes the right of way—annually, whereas other real estate is assessed biennially; because (3) it is said the board meets without notice to the railway; and because (4) no appeal is provided from the assessment of the board, whereas that privilege is accorded to the owners of all other property. Similar statutory provisions exist in many states of the Union; and numerous decisions are reported from various states, and from the supreme court of the United States, affirming the validity of the acts, in some

Constitution-
ality of statu-
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board for as-
sessment of
railroads.

one of which every question here raised has been pressed upon the attention of the court; but no case is cited denying their legality. The constitution of this state provides that the value of property for taxation shall be ascertained in such manner as the general assembly shall direct, making the same equal and uniform. Section 5, art. 16. There is nothing in this or any other provision of the constitution which either expressly, or by necessary implication, denies the legislature the power to classify property for the purpose of taxation, (*Little Rock & Ft. S. R. Co. v. Worthen*, 46 Ark. 330, *supra*;) and that classification is not prohibited by the federal constitution, so long as the law operates equally and uniformly upon all property of like kind, is definitely settled by the supreme court of the United States, (*State Railroad Tax Cases*, 92 U. S. 601; *Cummings v. Merchants' National Bank*, 101 U. S. 153; *Kentucky Railroad Tax Cases*, 115 U. S. 321.) From the peculiar nature of railroad property, its dissimilarity in use and value from the mass of other property, and its continuous extent through different localities, it is commonly regarded by the states that it cannot, in justice to the owners, be as fairly and uniformly valued by the numerous local instrumentalities provided for assessing other property as by a state board created for the purpose.

The industry of the attorney general has furnished us references to the statutes of a large number of states showing that the practice of assessment of railways as units by state boards is almost universal. In considering a statute of the state of Kentucky which pursued this system, the supreme court of the United States, in the case cited, says: "There is nothing in the constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power; and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made, as between railroad companies and other corporations, in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose." In a like case in California it was said: "The constitution of the state requires all property to be assessed at its actual value. We are unable

to see how the fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another kind of property by another officer or board—each clothed with the duty and responsibility of ascertaining the actual value—can be held to operate a deprivation of legal protection to the owners of either kind of property. The state board in the one case, the assessors and county boards in the other, are but different instrumentalities through which the same result is reached—the fair and just valuation by reference to the same standard—and therefore the equal and uniform valuation of property for purposes of taxation." *San Francisco & N. P. R. Co. v. State Board*, 60 Cal. 12, 13 Am. & Eng. R. Cas. 248. Authorities might be multiplied to the same effect.

The objection of the railways to being placed in a class to be dealt with separately by the legislature is thus seen to be

Biennial assessment of other real estate.

without foundation in reason or authority. But the power thus to classify makes it competent for the legislature to provide the periods for the assessment of each class as well as the mode. It is competent to provide that one kind of property shall be assessed every year, while the requirement reaches another only once in two years. Such a distinction between real and personal property is made without objection; but the difference between a railway, with its equipments and real estate, is perhaps not greater than that between real estate and some species of personalty. The fact that this statute denominates railway tracks as "real estate" does not obliterate the differences between them and ordinary farm lands any more than it would in fact convert railroads into personalty to call them so, as was done for the purpose of taxation, by the acts of 1871 and 1879, (Acts 1871, p. 135; Acts 1879, p. 40.) The nature of the property justifies classification and separation from the body of the real estate upon the grounds that justify the separate classification of realty and personalty. The requirement of an annual assessment of railways affords, therefore, no greater cause for complaint than does the like requirement for personal property; and the complaint of discrimination is groundless. *Central Iowa R. Co. v. Board of Supervisors*, 67 Iowa, 199, 22 Am. & Eng. R. Cas. 223.

More baseless than either of these objections is the argument that the company's property is taken without due process

Notice of meeting of board.

of law because no notice is given the company, and no opportunity to be heard, before the assessment becomes fixed. The time and place for the meeting of the board is fixed by the statute; and notice by statute is practically sufficient, and all that can be required

in such proceedings. Pulaski Equalization Board Cases, 49 Ark. 518. As was said in the State Railroad Tax Cases, 92 U. S., *supra*: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

The objection urged here to the failure to provide for an appeal from the valuation fixed by the state board was disposed of in the Kentucky Railroad Tax Cases, cited above; and what is there said of the relative rights of the owners of railways and of the owners of other property, and of the power of the tribunals which fix the values of the several classes of property for taxation, is so nearly applicable, under the laws of this state, that we quote the language as disposing of the question: "The final point of objection seems to be reduced to this: In the case of ordinary real estate, it is said, when the assessor has made his valuation, it is submitted to a board of supervisors, who may change the valuation, but not so as to increase it, without notice to the taxpayer, and an opportunity for a formal hearing, upon testimony to be adduced under oath, and with a right of appeal on his part, first, to a county judge, and, again, if the amount of the tax is equal to \$50, to the circuit court. This is contrasted with the proceeding in the case of railroad property before the board of railroad commissioners in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased. The discrimination, however, is apparent rather than real. An examination of the statutes shows that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the taxpayer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors, in case they undertake to increase the valuation made by the assessor. But in the case of railroad property no board has authority to increase the original assessment made by the railroad commissioners, and there is therefore no case for an appeal similar to that of the owner of ordinary real estate."

Appeal—Constitutionality of statute.

But, were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this court in the case of *Missouri v. Lewis*, 101 U. S. 22, 30. It

was there said by Mr. Justice BRADLEY, delivering the opinion of the court, and speaking to this point, that "the last restriction, as to the legal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of the decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress." The right to classify railroad property, as a separate class, for purpose of taxation, grows out of the inherent nature of the property; and the discretion vested by the constitution of the state in its legislature necessarily involves the right on its part to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the "equal protection of the laws."

The provision contained in the Kentucky act for the enforcement of the tax by proceeding in an ordinary court of justice does not alter the case as to the questions presented; for in such proceedings the valuation fixed by the board is conclusive, in the absence of a statutory provision authorizing inquiry into their finding, and it could not be assailed unless for fraud, or want of jurisdiction, (*East St. Louis C. R. Co. v. People*, 119 Ill. 182,) grounds upon which the court of equity could have acted in this case as readily as could the Kentucky tribunal in the case instanced. *La Salle & P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27; *St. Louis B. & T. R. Co. v. People*, 127 Ill. 627.

Much complaint is made in the abstract and brief of appellant over the fact that, having the same mileage in 1885 and 1886, the board nearly doubled the assessment of the former year in the latter. No fraud is charged; and it is notable in this case, as in those of the individuals who complained in the cases reported in 49 Ark. 518, that the board of equalization had greatly increased their assessment, that there is not even a charge of overvaluation of property. The only inference to be deduced from the increase in the assessment, standing alone, as was said in the case of *St. Louis, B. & T. R. Co. v. People*, 127 Ill. 627, *supra*, would be that the assessment for the first year was too low, or that the property had since increased in value, or that both facts existed. A mere discrepancy in judgment, however, between the members of the board and the chancellor to whom the application may be made for injunction, would not warrant interference on the part of the latter. The chancellor was right in declining

to interfere with the collection of the taxes, and the decree is affirmed.

Taxation—Constitutionality of Statutes Creating Special Boards.—See *Franklyn County v. Nashville, C. & St. L. R. Co.* (Tenn.), 17 Am. & Eng. R. Cas. 445; *Cincinnati, N. O. & T. P. R. Co. v. State* (Ky.), 13 *Id.* 270; note 24 *Id.* 626.

LOUISVILLE & NASHVILLE R. CO.

v.

COMMONWEALTH, to Use of MARION COUNTY.

(*Kentucky Court of Appeals, February 8, 1890.*)

Taxation—Interest on Overdue Taxes.—Taxes are not “debts” within the legal meaning of the term, and in the absence of a statutory provision interest cannot be recovered thereon.

Same—Action to Recover Back—Voluntary Payment.—If a railroad company has overpaid taxes against it for a certain year and the amount overpaid has been credited upon the taxes levied for the following year, there is virtually a voluntary payment of the taxes for the latter year under a mistake of law, and the company cannot maintain an action to recover them.

Same—Liability for Assessment to Pay Subscription.—A railroad company cannot be taxed by a county to pay the subscription of the county to aid in its construction although the county has issued bonds in payment of the subscription.

Same—Division of Company into two Corporations—Effect.—Where the legislature has by consent of all the stockholders merely divided a railroad company into two distinct companies, and the county has, by virtue of the charter of the original company and the subsequent legislation, become a stockholder of one of such companies under a subscription in aid, the equity which the old company had to exemption from taxation to pay the subscription to it, passes to the new company.

Same—Validity of Levy.—If a tax be levied for a specific purpose, the order for the levy must show that it was levied for that purpose.

APPEAL from Circuit Court, Marion County.

Rountree & Lisle, H. W. Bruce, and William Lindsay, for appellant.

Sam. T. Spalding and Lewis Edelen, for appellee.

HOLT, J.—The Marion county court for the years 1882, '83, '84, levied an *ad valorem* tax for county purposes of 30, 40 and 50 cents, respectively, upon each \$100 in value of taxable property in the county. It also levied for each of said years a like tax of 70 cents upon each \$100 in value of taxable property, to pay the interest on the bonds it had issued in payment of its \$300,000 subscription to the Cumberland & Ohio Railroad, and to create a sinking fund for the

Facts.

payment of the principal of them. About 28 miles of the Knoxville branch of the Louisville & Nashville Railroad lies within the county, as does about 13 miles of what is now the Southern Division of the Cumberland & Ohio Railroad. The latter road was chartered in 1869. The county made its said subscription to it, and in 1871 adjusted it by delivering to the company bonds payable to bearer at the end of 20 years. The road being incomplete, the company being without means or credit to proceed with the work, and the time fixed in the charter for its completion being about to expire, the legislature, in 1878, amended the charter so that the company could, and it did by agreement of the stockholders, Marion county consenting thereto, divide itself into two distinct corporations, called the "Northern" and "Southern" Divisions of the Cumberland & Ohio Railroad Company. Under this arrangement a certain portion of the road, and which included that part in Marion county, became the Southern Division, and the property of the stockholders south of a certain point, Marion county being one of them. Soon after the Southern division leased its incompleted line to the Louisville & Nashville Railroad company for 25 years, Marion county voting its \$300,000 of stock subscribed to the Cumberland & Ohio Railroad Company in favor of such lease. By its terms the Louisville & Nashville Railroad Company was to complete and equip the road, it being secured in the necessary expenditure, and any debts of the Southern Division it might pay, by mortgage bonds of the road to the amount of \$300,000, two-thirds of the net earnings to go to the Southern Division, and one-third to the lessee; provided, however, if the mortgage bonds did not repay the Louisville & Nashville road its expenditure above named, then the net earnings were to be applied for that purpose. The lease also provided that all taxes legally assessed upon the leased property should be paid out of the gross earnings of the road. The road was, under this contract, completed through Marion county, and to a point beyond, and the Louisville & Nashville Railroad Company has since been operating it. The portion in Marion county of the two roads was duly assessed by the board of railroad commissioners, and the assessment certified by the auditor to its county clerk. The appellant paid a portion of the tax levied for county purposes for the years 1882, '84. It also made payments upon the railroad tax for the same years; and if the portion of the Southern Division of the Cumberland & Ohio Railroad lying in Marion county was not liable for this last-named tax, as is claimed, but only so much of the Knoxville branch as is in the county, then the appellant overpaid this tax for the year 1882 by about \$500. This action was

brought to recover the balances of the tax for county purposes for 1882, '84, and for that of 1883; also a balance of the railroad tax for 1882, as the county claims both roads are liable to it; a balance for 1884; and for the tax of 1883. Interest was claimed upon all these amounts. The lower court held the county levies to be invalid; that the Southern Division of the Cumberland & Ohio Railroad was not subject to the railroad tax; but rendered a judgment for so much of this tax for the year 1883 as had been assessed against the Knoxville branch of the appellant, with interest from October 1, 1883, and also for the year 1884, with interest from October 1, 1884, less what the appellant had paid on its railroad taxes for the last-named year. It refused to take any account of the overpayment by the appellant on its railroad taxes for 1882. The railroad company now complains of this refusal, and also because of the allowance of interest in the judgment. The county, upon the other hand, by a cross-appeal, seeks to reverse the ruling below as to the taxes for county purposes, and the alleged non-liability of the Southern Division of the Cumberland & Ohio Railroad for the railroad taxes.

Taxes are not "debts," within the legal meaning of the term. They are not based upon contracts, either express or implied. They come upon the taxpayer *in invitum*. Their payment is a duty which the citizen owes to the state, in return for the protection it affords him and his property. Interest is not allowable upon them by the general law. The power to impose it must come from a statute. Although they are payable at a certain time, they do not carry interest, unless the statute says so. It, upon the contrary, provides fixed penalties for their non-payment. It was said by this court in the case of *Ormsby v. City of Louisville*, 79 Ky. 197, 4 Am. & Eng. R. Cas. 342, that interest is not allowable upon taxes by way of damages; and this rule has since been followed in *Louisville & N. R. Co. v. Hopkins Co.*, 87 Ky. 605, 37 Am. & Eng. R. Cas. 400; *Kentucky Cent. R. Co. v. Pendleton Co.*, (Ky.), 2 S. W. Rep. 176; and other cases.

Interest on
overdue
taxes.

If credit were given to the appellant upon the railroad taxes for 1883, for the amount overpaid on those of 1882, it would practically be a recovery of taxes voluntarily paid by the appellant under a mistake of law. These taxes could only be recovered by suit. Resort to judicial proceedings was necessary. The statute provides this mode of collection. If the appellant declined to pay, it necessarily followed that it would have its day in court, where it could raise the ques-

Voluntary
payment un-
der mistake
of law.

tion of its liability for them. It is a general rule that a voluntary payment by the taxpayer leaves him remediless. If, however, distraint, or summary mode of collection may be adopted, then the payment will not be regarded as voluntary, and the taxpayer may sue to recover taxes collected without legal authority.

A distinction is to be taken between cases where their collection can be enforced summarily, and those where resort must be had to the courts. In the one case, the taxpayer must submit to a levy upon his property or pay the money; in the other, he has the opportunity to contest the demand in court, and if he does not choose to do so, and voluntarily pays it, he is remediless. Considerations of public policy require this rule, and the taxpayer cannot complain with grace because he has by his own neglect missed the opportunity afforded him by law for his protection. This view is supported by the cases of *City of Louisville v. Anderson*, 79 Ky. 334, 3 Am. & Eng. Corp. Cas. 585, and *Louisville & N. R. Co. v. Hopkins Co.*, *supra*.

It has been repeatedly held by this court that a railroad cannot be taxed by a county to pay the subscription of the same county to aid in its construction. Court *v. Railroad Co.*, 7 Ky. Law Rep. 761; *Louisville & N. R. Co. v. Hopkins Co.*, *supra*. If this could be done, it would result that the county would only pay a portion of its debt. It would be *quasi* repudiation. The creditor would be made by his debtor to pay a part of his own demand. The railroad would, in fact, get but a part of the subscription, and the obligation of the contract would *pro tanto* be impaired. It matters not that the county issued bonds in payment of the subscription. It now proposes to tax the road to pay these bonds. This is the same as if it proposed to tax the road to pay the subscription. It is doing it, in effect. The Louisville & Nashville Railroad Company is not the owner of this Southern Division of the Cumberland & Ohio Railroad. If it had purchased it, and then completed it or added to it, a different case would be presented. As this record shows, however, it is merely its creditor, and is operating it under a lease. The road, including all the improvements which have been put upon it, belongs to the Southern Division of the Cumberland & Ohio Railroad Company. It is true the county subscription was to the Cumberland & Ohio Railroad Company. What is now, however, the Southern Division, cannot be regarded, so far as the subscription is concerned, as a new or distinct company. The legislature merely divided the old company into two distinct companies, by consent of all the stockholders, Marion county

Taxation to
pay subscrip-
tion.

included; it becoming, by virtue of the charter of the original company and the subsequent legislation, a stockholder to the extent of its subscription in the Southern Division, and its taxpayers stockholders therein upon the payment of their taxes *pro tanto*, the county stock thereupon decreasing to that extent. The equity which the old company had to the exemption from taxation to pay the subscription to it passed to the new company. The latter is not a purchaser. The old company being merely divided by the legislature, and the new one invested, by the act of the legislature creating the two divisions, with all the rights and powers of the old company, it was not divested of the exemption from taxation in aid of the subscription to build the road. To so hold would not only be inequitable, but unreasonable.

Division of
corporation
into two
companies.

There is no law authorizing an *ad valorem* tax for county purposes generally. The law provides for a head tax only, for these purposes. Nor is there any act of the legislature to this effect as to Marion county. It is only allowable for specific purposes. If a municipal corporation imposes taxes, it must be able to show due authority to make the demand. If a tax be levied for a specific purpose, it must appear that it was levied for that purpose. *Price v. Trustees*, 1 Ky. Law Rep. 276. The taxpayer, when he pays an *ad valorem* county tax, has a right to know the purpose intended, and how it is to be applied. The orders for the county levies, aside from those relating to the railroad tax, failed *in toto* to show the object to which they were to be applied; and they are not aided by any sufficient pleading in this respect, even conceding that this were possible. The judgment upon the main appeal is reversed, so far as it allows interest. It is affirmed upon the cross-appeal, and case remanded for further proceedings consistent with this opinion.

Pleading—
Levy of tax
for specific
purpose.

YAZOO & MISSISSIPPI VALLEY R. CO.

v.

THOMAS, Sheriff, *et. al.*

(United States Supreme Court, November 18, 1889.)

Taxation—Exemption—Statute Impairing Obligation of Contract—Federal Question.—Where a railroad company claims that it is exempted by its charter from taxation imposed pursuant to a statute subsequently passed, the question arises whether the statute imposing the taxes impairs the obligation of the contract, and the supreme court of the United States has jurisdic-

tion to review the decision of the supreme court of the state sustaining an assessment under the latter statute, although such decision was rendered upon the ground that the exemption properly construed was not applicable to the taxes assessed, and the state court never considered the effect of the statute upon the charter of the company.

Same—When Exemption Begins—Completion of Railroad.—The provisions of the charter of the Yazoo & Mississippi Valley R. Co., that the company's property shall be exempted from taxation for a term of 20 years from the completion of its railway to the Mississippi river, "but not to extend beyond 25 years from the date of the approval of this act," takes effect only upon the completion of the railroad to the Mississippi river, and so long as it remains uncompleted it is subject to taxes imposed by a later statute. Affirming 37 Am. & Eng. R. Cas. 392.

IN ERROR to the Supreme Court of the State of Mississippi.

The Yazoo & Mississippi Valley Railroad Company was incorporated by an act of the Mississippi legislature, approved February 17, 1882, the preamble and §§ 2, 8, 13, and 14 being as follows:

"Whereas, the construction of railroads to, in, through, and along the Mississippi river basin, and the Yazoo and Sunflower river basins, penetrating these and other alluvial lands in this state, west of the Chicago, St. Louis & New Orleans Railroad, and connecting them by railroads and branches with other railroads west, east, north, and south, is deemed and hereby declared to be a work of great public importance, and, in strict accordance with the true policy and interest of this state should be encouraged by legislative sanction and liberality; and, whereas, the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms, or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands and connecting them with the railroad system of the country: Now, therefore, in order to induce the investment of capital in the construction, maintenance, and operation of such a railroad and branches, and thus develop the resources and wealth of this state"—

"Sec. 2. Be it further enacted that the said corporation shall also have, and it is hereby authorized and invested with, the right and power to build and construct, and thereafter, to use, operate, own, and enjoy a railroad or railroads, with one or more tracks, into, along, and across that part of the state of Mississippi lying between the Mississippi river and the Chicago, St. Louis & New Orleans Railroad, on such line or lines as shall be deemed best by the board of directors of the company hereby chartered; one of said lines, or a

branch therefrom, to reach the Mississippi river at or near a point opposite Arkansas City, if practicable, so as to connect such point on the east bank of the Mississippi river with some point or points on the line of the Chicago, St. Louis & New Orleans Railroad; one of said lines of railroad, or a branch, therefrom, to be extended to, or pass through, Yazoo City, Mississippi; and said company shall have the right and power and are hereby authorized, to build one or more branches or lines of railroads between the Mississippi river and Deer creek, and between Deer creek and the Sunflower river, and between the Sunflower and Yazoo rivers, in the direction of or to the north line of this state, and extend the same, or any one thereof, in the direction of or to the south boundary line of this state, as shall from time to time, in the judgment of said company, be deemed proper; and shall also be authorized to construct and operate such spurs or laterals from or along such main line or branches, not exceeding one hundred miles in length, as may from time to time be necessary or proper to fully develop said country lying west of the Chicago, St. Louis & New Orleans Railroad, and east of the Mississippi river, in this state; and the said company, as soon as and whenever, from time to time, they have located said line or lines of railroad, or branches, spurs, or laterals thereto, or any of them, shall file in the office of the secretary of state a statement showing the general line thereof, as far as the same has up to that time been located."

"Sec. 8. Be it further enacted that in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this state will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this state necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil-mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act; and, when the period of exemption herein prescribed shall have expired the property of said railroad may be taxed at the same rate as other property in this state. All of said taxes to which the property of said company may be subject in this state, whether for county or state, shall be collected by the treasurer of this state, and paid into the state treasury, to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns."

"Sec. 13. Be it further enacted that, unless said company shall construct and have in operation twenty miles of railroad within three years from the passage of this act, the legislature shall have the right to declare this charter forfeited."

"Sec. 14. Be it further enacted that all acts in conflict with this act, or any part thereof, be and the same are hereby repealed, and that this act take effect and be in force from and after its passage, the public welfare requiring it." Laws Miss. 1882, p. 838.

By section 1 the corporation is authorized to hold, purchase, receive, and enjoy real and personal estate in Mississippi and other states, however acquired, and to sell, rent, lease, mortgage, or otherwise dispose thereof. By section 5 it is empowered to consolidate with any other company or companies, and acquire or lease other railroads in or out of the state for a term of years or in perpetuity: to do an express business over its own and other lines of railroads and steamboats, or other conveyances, in and out of the state; and to acquire, put up, use and operate a line or lines of telegraph in this or other state or states; by section 6, to fix its own rate of charges, not to exceed a maximum indicated, provided, it may make special agreements with shippers as to lumber, coal, iron, etc., and other freights transported in car-loads, without discrimination; by section 7, to enter on state lands anywhere, and take in fee-simple 100 feet on each side of the center of any of its tracks, as right of way; to use any rocks, timber, earth, sand, gravel, water, or other materials anywhere found on such state lands; to build bridges across any stream, whether navigable or not, with power and authority "to build, construct, maintain, and operate, of itself or with others, in or out of this state, a ferry across, or a tunnel under, or a bridge over, the Mississippi river, at any point within this state, where its railroads, branches, laterals, or spurs may reach said river;" to acquire all lands and materials necessary for landings, wharves, inclines, or approaches thereto; to establish such landings, wharves, etc., as may be necessary or convenient in transporting freights, passengers, cars, or rolling stock, loaded or unloaded, upon and across said Mississippi river, or any other river or body of water within this state; and to own, use, and operate, and control by itself or others, "all such steamboats, ferries, or other water-craft as are or may be convenient or necessary in crossing such water, so as develop trade over said lines of railroad;" by section 9, to insure persons and property, or either, transported or to be transported over any part of its line, and all other property coming into the possession or control of said company for transportation or storage, and to charge reason-

ble compensation for such insurance or storage; to erect or acquire and use such depots, storage houses, wharves, etc., as shall be necessary or convenient; and to construct and operate compresses and oil mills; by section 10, to run its railroad, branches, laterals, or spurs into the corporate limits of any incorporated town or city; and to build and operate its tracks across or along any streets of such incorporated municipality; and by section 11, the board of directors, stockholders, executive committee, officers, and agents of the company may hold their meetings and transact the company's business in or out of the state, and establish such offices as they deem best in or out of the state, and all acts done by said company, its officers or agents, out of the state, shall be of the same force and effect as if done within the state.

By the Code of Mississippi of 1880, under the heading "Taxation of Railroads," taxation was provided for in certain sections, summarized by counsel, in substance, as follows:

Section 597 provides that each railroad company owning and operating a railroad in this state shall, on or before the third Monday in August in each year, file with the auditor of public accounts a complete schedule of all its property, real or personal, setting forth the length in miles or fractions of its roadbed, switches, and side tracks, and showing the number of miles and fractions lying in the state, and in each county, and in each incorporated town, and the value of the whole, and each part as herein subdivided,—capital stock, bonded indebtedness, the gross amount of receipts, the rolling stock, depot buildings, work-houses and machine-shops, car-shops, and stationary machinery, and the county and town in which situated, and the land on which they are situated, together with all other real, mixed, and personal property.

Section 599 requires: The auditor, when this schedule has been filed, and also in cases when it has been refused, is directed to notify the governor of the state of the fact, who shall proceed to convene the auditor, treasurer, and secretary of state, who, thus convened shall assess the value of each railroad for purposes of taxation, and shall certify the same to the auditor of public accounts.

Section 600 provides the means of ascertaining the items and value of the property. The board is directed to value the entire road and property, that value is to be divided into the number of miles in the state, and the valuation for each county is to be according to the number of miles of the road in each. The number of miles for the state shall be the product for state taxes, and the number of miles in each county the product for county taxes; and having thus ascertained the sums to be taxed, they shall certify the same and the facts to the auditor.

Under section 601 may be added 10 per cent. on the amount of taxes assessed against railroad companies failing or refusing to file schedules as directed by section 597, or filing unfair ones.

Section 603 provides that when the valuation so ascertained and certified has been furnished to the auditor he shall ascertain the taxes due the state and counties, and notify the companies of the amounts due to the state, by letter or otherwise, and shall certify the sums to be taxed in the several counties for county purposes to the clerk of the chancery court of the county, and the amount to be taxed by cities and towns to the mayor thereof, and the sums so certified shall be entered on the collector's books, to be collected as other taxes; and by section 604 the auditor shall collect the taxes due the state by distress warrants, issued to any sheriff, authorizing the seizure and sale of personal property in the county; and, should the personal property be insufficient, the auditor may sell the entire road and franchise to the highest bidder, and the purchase shall be put in possession.

Sec. 605. The county taxes are to be collected as all other taxes.

Sec. 606. Railroad property situated in any city or incorporated town may be taxed for city or town purposes, upon a valuation thereof made upon the same basis as the property of individuals, and this section is to apply to the foregoing, as well as to the following modes of taxation herein provided for.

Section 607 provides that every railroad accepting this act, and annually paying to the auditor of public accounts the taxes hereinafter provided for, and signifying their acceptance in writing, shall be exempt from all the foregoing provisions, except section 606,—in relation to cities and towns,—and such payment shall be in full of all state and county taxes; 50 per cent. of the amount paid to be placed to the credit of the counties through which the railroad may pass, to be divided among them according to the number of miles in each. Lands owned by such railroad companies, and not used in operating the roads, shall be taxed as other property, and for all purposes.

Sec. 608. Each railroad company whose line is in whole or in part in this state shall, if it accepts the provisions of this act, pay to the state treasurer, on the warrant of the auditor, on or before the 31st day of December in each and every year, a privilege tax as follows, to-wit, [here follows a list of the existing railroads in the state, their names being given, and the sums required of each,] provided, that no railroad company shall be subject to taxation under this chap-

ter while the same is in process of construction, but, if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished." Code Miss. 1880, p. 194 *et seq.* In 1884, section 604, so far as it provided for putting a purchaser of a railroad under the tax-sale therein mentioned in possession of the road, was repealed, and section 607 was so amended as to give to the counties two-thirds, instead of 50 per cent., of the privilege tax. Section 608 was amended so as to read: "Each railroad company whose line is in whole or in part in this state shall, if it accepts the provisions of this act, pay to the state treasurer, on the warrant of the auditor, on or before the 15th day of December in each and every year, a privilege tax as follows, to-wit, [then follows the names of the companies, not including appellant,] all the railroads not named herein, and not exempt from taxation by their charters, sixty dollars per mile: provided, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction; but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished; nor where the same is now exempt from taxation by its charter." Laws Miss 1884, chap. 22, pp. 29, 30. In 1886 the privilege tax for all railroads was increased 25 per cent. Acts 1886, p. 23. April 3, 1888, the legislature of Mississippi passed an act entitled "An act to provide for the assessment of past-due and unpaid taxes on railroads which have escaped the payment thereof," the first section of which is in these words: "that every railroad which has failed to pay the taxes for which the same was liable for any year for which it was so liable, such railroad not being exempt by law or its charter from taxation for such years, and so being liable to taxation, shall be assessed for and shall pay an *ad valorem* tax, to be assessed as hereinafter provided, unless such railroad shall, within sixty days after the passage of this act, pay the taxes for which the same was liable according to its charter, or shall pay the privilege taxes for which the same was liable, as follows: If a standard or broad gauge road, for the years prior to 1884, eighty dollars per mile; for the years 1884 and 1885, one hundred dollars per mile; and for the years 1886 and 1887, one hundred and twenty-five dollars per mile; and, if a narrow gauge, or not standard or broad gauge, road, for the years prior to 1884, forty dollars per mile; for the years 1884 and 1885, fifty dollars per mile; and for the years 1886 and 1887, sixty-two dollars and fifty cents per mile." Laws Miss. 1888, chap. 28, p. 49. Section 2 provides that 60 days after the passage of the act the tax collectors of the sev-

eral counties through which any railroad runs which has failed to pay the taxes for which it was liable, and failed to avail itself of the provisions of the first section, and paid taxes according thereto, shall assess, as additional assessment, every such railroad in their respective counties for the several years for which taxes have not been paid, on lists duly prepared for that purpose by the railroad commission, whose duty it shall be to prepare such lists immediately after the passage of the act; and then proceeds with other particulars in relation to the valuation, assessments, and collection, referring to various sections of the Code, so far as applicable. Under this act taxes amounting to \$58,000 were assessed against appellant for the years 1885, 1886, and 1887, in respect to parts of its line which were operated in those years for business as a carrier, the road not having been completed to the Mississippi river. On the 17th of July, 1888, appellant filed its bill in the chancery court of Hinds county against Thomas and others, the appellees here, who were sheriffs and tax collectors of the several counties through or into which the road extended, to enjoin the collection of the taxes so assessed upon its railroad property, as unauthorized and illegal. The illegality complained of was that the tax was in violation of the company's charter, by which, it was insisted, the property of the company incident to its railroad operations was exempted from taxation; and it was averred that the charter, as respects the exemption claimed, was a contract "irrevocable, and protected by the contract clause of the constitution of the United States; that the unwarranted application of the general laws subsequently passed, as well as the application of the general laws in force at the time, is equivalent to a direct repeal of the charter exemption; that it is an effectual abrogation of its privilege of exemption by means of authority exercised under the state." To this bill the defendants demurred. The demurrer was sustained, and the bill dismissed by the chancery court, and the complainant appealed to the supreme court of the state of Mississippi. The decree of the court below was affirmed by that court, and to this judgment of affirmance the plaintiff in error sued out the pending writ of error. The opinion of the supreme court is reported in 37 Am. & Eng. R. Cas. 392.

Together with arguments upon the merits, a motion to dismiss was also submitted.

James Fentress and W. P. Harris for plaintiff in error.

T. M. Miller and Marcellus Green for defendants in error.

FULLER, C. J.—The supreme court of Mississippi did not put its decision upon the ground that it was not competent

under the state constitution for the state to contract with the company that the latter should not be subjected to taxation, but upon the ground that the exemption claimed could not be allowed. The taxes in question were assessed under the act of 1888, and if the charter of the company, which became a law on the 17th of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. Although by the terms of the act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the supreme court held that this company is not exempt, and is embraced within the act; so that, if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered, under the ruling of the supreme court, as intended to apply to the company. The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for, if the contract existed, those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled.

Impairing
obligation of
contract—
Jurisdiction.

By the eighth section of the company's charter it was declared "that said company, its stock, its railroads, and appurtenances, and all its property in this state necessary or incident to the full exercise of all the powers herein granted,—not to include compresses and oil-mills,—shall be exempt from taxation for a term of 20 years from the completion of said railroad to the Mississippi river, but not to extend beyond 25 years from the date of the approval of this act; and, when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this state." If the provision had terminated with the words "Mississippi River," it would not be open to argument in this court that the exemption claimed did not commence until the river was reached. In *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 24 Am. & Eng. R. Cas. 500, it was held that a provision in a railroad charter by which "the capital stock of said company shall be exempt from taxation; and its road, fixtures, work-shops, warehouses, vehicles of transportation, and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this state," did not exempt the road, fixtures, and appurtenances from taxation before such completion. It was argued there, as it is here, that the legislature, while exempting the railroad from taxation for 10 years after its comple-

When exemp-
tion com-
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railroad.

tion, could not have intended to subject it to taxation before its completion, and when its earnings were little or nothing. On the other hand, it was argued there, as it is here, that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation by postponing or omitting the completion of a portion of the road; but this court said, speaking through Mr. Justice GRAY: "Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision where the words of the statute creating the exemption are plain, definite, and unambiguous." It appeared there, as it does here, that the taxing officers of the state had omitted in previous years to assess the property; but it was held that such omission could not "control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed." And the court took occasion to reiterate the well-settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*. Tested by that rule, did the addition of the words "but not to extend beyond 25 years from the date of the approval of this act" operate to create an exemption of 25 years from the date of the act, subject to being reduced to less than that if the road were completed to the river before the lapse of 5 years, but for 20 years at all events; or did it operate to reduce the term of the 20 years exemption by so much as the completion of the road to the river took over 5 years? Upon the one view, there would be a loss of exemption through rapidity of construction; in the other view, a gain,—or, rather, the prevention of a loss. Does it appear by clear and unambiguous language that the state intended to surrender the right of taxation for 25 years? If the surrender admits of a reasonable construction consistent with the reservation of the power for a portion of the longer period, then for that portion it cannot be held to have been surrendered. Is not the construction that the exemption was to be for a term of 20 years, subject to a diminution of that term if the river were not reached in 5 years, as reasonable as the opposite construction; and, if the latter construction be adopted, would it not be extending the exemption beyond what the language of the concession clearly requires? Can an exemption ex-

pressly limited to a term of 20 years after the accomplishment of a designated work, but not to extend beyond 25 years from a certain date, be read as an exemption for 25 years, but not to extend beyond 20 years from the completion of that work? It seems to us, notwithstanding the able and ingenious arguments of appellant's counsel, that these questions answer themselves, and that the exemption claimed cannot be sustained. By the general law of the state of Mississippi in force at the time the charter of appellant was granted, it was provided that no railroad company should be subject to taxation while the same was in process of construction, but, if any part of any road should be completed so as to be used for profit, the part so used should be taxed, although the whole road might not be finished. Rev. Code Miss. 1880, § 608. It is admitted that the taxes here were levied in respect to parts of the road which were in operation.

The second section of its charter empowered the corporation to build and construct, and thereafter use, operate, own, and enjoy a railroad or railroads into, along, and across that part of the state lying between the Mississippi river and the Chicago, St. Louis & New Orleans Railroad, "one of said lines, or a branch therefrom, to reach the Mississippi river at or near a point opposite Arkansas City, if practicable, so as to connect such point on the east bank of the Mississippi river with some point or points on the line of the Chicago, St. Louis and New Orleans Railroad;" and by section 7 it was empowered to "build, construct, maintain, and operate of itself, or with others, in or out of this state, a ferry across, or a tunnel under, or a bridge over, the Mississippi river, at any point within this state where its railroads, branches, laterals, or spurs may reach said river," and to acquire lands, etc., for landings, wharves, inclines, etc., and to establish said landings, wharves, inclines, etc., as might be necessary or convenient in transporting freights, passengers, etc., upon and across said Mississippi river. In our opinion, it cannot be doubted that a principal object of the grant to the company was the building of a line across the state from the Chicago Railroad to the Mississippi river, and that the point of contact was to be opposite Arkansas City, if that were practicable. Five years was contemplated as sufficient to complete the road to the river, so that the 20 years exemption should commence. By the thirteenth section it was provided that the legislature might declare the charter forfeited, if 20 miles were not constructed and in operation within three years from the passage of the act. This indicates that the legislature did not assume that the line might probably be extended to the river in less than 5 years, and were not thereby induced to insert the 20 years as a limitation on the 25. No

reason is perceived for limiting the exemption to begin with the completion of the railroad to the Mississippi river, if it were intended that the exemption should be for more than 20 years, at all events, commencing with the approval of the act. The question when the property may be taxed is answered by ascertaining when the period of the specified exemption begins; for until then the general law provided that, while the road could not be taxed during the process of construction, such parts as were finished and in operation could be, though they might be for a time exempt, under the charter, after the line was completed to the Mississippi river. When the Mississippi river was reached, then the period of exemption would begin; but how long it would continue would depend upon the length of time to elapse before the end of 25 years from the approval of the charter. And this disposes of the argument that it is immaterial whether the period of exemption is 20 or 25 years, because it is agreed that the property could not be taxed until the period of exemption, whatever that is, shall have expired; for that ignores the real inquiry, which is as to when the exemption commences.

Again, the preamble to the act is referred to by counsel, as sustaining their construction, because it is therein declared that the work is one of "great public importance" and "to be encouraged by legislative sanction and liberality," and that "the physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country." But, as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up. Indeed, what is therein stated appears to us to be quite as referable to the remarkably extensive powers granted as to the assignment of reasons for exemption from taxation. It is true that it is stated in section 8 that in order to encourage the investment of capital in the enterprise, and "to make certain in advance of such investment, and as inducement and consideration therefor, the taxes and burdens which this state will and not impose thereon," the exemption is thereby declared. Yet if, notwithstanding that statement, the matter were left uncertain, that would not allow the court to make it certain by construction, and to remove ambiguity upon the presumption of a legislative intent

contrary to the fixed presumption where the rights of the public are involved. In short, there can be no uncertainty in the result when the language used is construed, as it must be, in accordance with thoroughly settled principles. After stating the exemption in controversy, section 8 concludes as follows: "And when the period of exemption herein prescribed shall have expired the property of said railroad may be taxed at the same rate as other property in this state. All of said taxes to which the property of said company may be subject in this state, whether for county or state, shall be collected by the treasurer of this state, and paid into the state treasury, to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns." Since upon the expiration of the period of exemption it would have followed that the property of the company would be subject to taxation at the same rate as other property, it may be that the object of the final clause was to create a scheme of taxation peculiar to the road. Upon the comprehensiveness and validity of such scheme we do not undertake to pass. It was not to take effect until the exemption expired, and the terms in which it was couched do not render the commencement of the exemption other than the supreme court held it to be. The case is clearly controlled by our decision in *Railway Co. v. Dennis*, *supra*, and the judgment must therefore be affirmed.

INTERNATIONAL & GREAT NORTHERN R. CO.

v.

STATE.

(*Texas Supreme Court, December 10, 1889.*)

Exemption from Taxation—Corporate Right or Privilege—Quo Warranto.—Exemption from taxation is not a franchise or corporate right or privilege within the meaning of a statute authorizing the institution of proceedings by *quo warranto* "in case any person shall usurp, intrude into, or unlawfully hold * * * any office or franchise, * * * or any incorporation does or omits any acts which amounts to a surrender or forfeiture of its rights and privileges as a corporation."

Same—Forfeiture—Failure to Exercise Corporate Privileges.—The immunity from taxation granted by a charter, which for good consideration declares that the railroad and other property "which is now or hereafter may be owned or possessed by said company or its successors," is exempted from taxation, adheres to property exempted, and cannot, in *quo warranto* proceedings be declared forfeited for a failure to exercise corporate privileges.

APPEAL from District Court, Travis County.

Baker, Botte & Baker and *S. R. Fisher* for appellant.

Jas. S. Hogg, Atty. Gen., for the State.

STAYTON, C. J.—This proceeding was brought by the state, through the attorney general, under the act regulating proceedings in *quo warranto*, and the purpose of the proceeding was: (1) To have declared a forfeiture of the company's charter, and wind up its business; (2) to have a decree withdrawing from the company's property the immunity from taxation given by the act of March 10, 1875. On hearing, the court below found that the facts proved did not justify a forfeiture of the company's charter, but that the facts relied upon for that purpose were sufficiently shown to authorize a decree declaring the company's property no longer exempt from taxation. A judgment was entered accordingly by the district court for Travis county on June 21, 1888. Appellant gave notice of and perfected an appeal in proper time, and both parties filed assignments of error but the record was not filed at any branch of this court until April 3, 1889, when a motion to dismiss the appeal was filed by the state. This court was in session at Austin when the judgment was rendered, and on the first Monday in October following convened at Tyler, where a term was held, and then convened at Galveston where a term was held, after which it convened at Austin again, on the first Monday in April, 1889. The ground of the state's motion to dismiss was that the appeal was not prosecuted to the term pending when the judgment was rendered, nor to the succeeding term, held at Tyler. The motion was overruled, but without any written opinion; and the state now seeks a revision of so much of the action of the court below as refused to forfeit the charter of the company, and to sustain the other part of the judgment.

The statute regulating appeals from judgments rendered in proceedings on information, in the nature of *quo warranto*, provides "that all such appeals shall be prosecuted to the term of the court in session, at either branch, or to the first term to be held, if not in session, after judgment has been rendered in the district court;" and it has been held, in accordance with this and other provisions of the statute showing a legislative intention that such causes should be speedily disposed of, that there must be a substantial compliance with the statute. The act prescribes the cases in which informations under it may be prosecuted, and its other provisions must be held to apply only to such proceedings as are contemplated by it. So much of the act as it will be necessary to consider is as follows: "In case any person shall usurp, intrude into, or unlawfully hold or execute or is now intruded into, or now unlawfully holds or executes, any office or franchise, or any

Statute regulating proceedings by *quo warranto*.

office in any corporation created by the authority of this state, or any public officer shall have done or suffered any act which by the provisions of law works a forfeiture of his office, or any association of numbers of persons shall act within this state as a corporation, without being legally incorporated, or in any corporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation or exercises powers not conferred by law,

* * * the attorney general or district or county attorney of the proper county or district, either of his own accord or at the instance of any individual relator, may present a petition," etc. There are but two parts of this statute which can have any application to the question raised by the motion to dismiss, and to the state's right now to have revised so much of the decree as refused a forfeiture of the charter of the company. If the state attempted to do something through this proceeding not contemplated by the statute, then its provisions regulating appeals, as to such a matter, can have no application; but, in so far as the proceeding was contemplated by and in pursuance of the statute, its provisions regulating appeals must be applied. That part of the statute which declares that an information may be filed and heard "in case * * * any incorporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation," and that in case the corporation be adjudged guilty the court shall declare a forfeiture of the corporate franchise, is that on which the proceeding was based, and properly based, in so far as the forfeiture of the charter of the company was concerned, and, if the state desired to appeal from the judgment in so far as adverse to it, then it should have complied substantially with the statute; and, not having done so, we are of opinion that it cannot now have a revision of any matter permitted by the statute to be adjudicated under the terms and restrictions therein found.

We will notice the grounds upon which the motion to dismiss the appeal was overruled, for it is intimately connected with the main question involved in this appeal. It was not believed that the statute on which the proceeding is based authorized so much of it as sought to have a decree declaring that the exemptions of appellant's property given by the act of March 10, 1875, and compliance therewith, should cease to exist: and that for this reason the provisions in regard to appeals could not affect appellant's right to prosecute its appeals under the general laws applicable thereto. It would hardly be contended, if the state's officer, in a proceeding properly instituted under the statute to forfeit the charter of

the company, had joined with that a proceeding to try the company's title to its lands, railway, rolling stock, and other property, that the latter would be governed by the statute in question as to time and mode of prosecuting an appeal. To be governed by the particular statute the proceeding must be one authorized and contemplated by it; for it is only because it was thought that the best interests of all, in reference to such matters, would be subserved by most speedy determination of the litigation that a different rule to that applied in other cases, as to time within which appeals should be prosecuted, was prescribed. The "rights and privileges" contemplated by the clause of the statute before referred to are evidently such as result from the fact of incorporation, the right and privilege to be a corporation, and to exercise the powers necessary to the consummation of the purposes for which corporate existence is given,—“rights and privileges as a corporation,” and not such rights and privileges in relation to property as may be vested in a corporation or an individual by contract or legislation. *Morgan v. Louisiana*, 93 U. S. 223; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 185. The character of right conferred by the act of March 10, 1875, in so far as exempted appellant's property from taxation for a fixed period, will be considered in another connection, and it is sufficient now to say that it is not embraced in the terms “rights and privileges as a corporation.” That part of the statute which declares that information may be filed “in case any person shall usurp, intrude into, or unlawfully hold or execute, or is now intruded into, or now unlawfully holds or executes, any office or franchise, or any office in any corporation created by authority of this state,” is the only part not considered which, with any show of reason, could be claimed to authorize a proceeding under the statute to withdraw appellant's right to exemption from taxation; but it is too clear that this language does not apply to such a right or immunity, even though, in a general sense, it may be termed a “franchise,” and that it applies only to usurpation of or intrusion into an office, or a franchise pertaining thereto. A much more restrictive meaning has constantly been given to the statute of Anne from which this part of the statute is taken. *State v. Smith*, 55 Tex. 451.

Appellant's claim to exemption from taxation is based on the act of March 10, 1875, so much of which as has application to the question before us is as follows: “An act for the relief of the International Railroad Company, now consolidated with the Houston & Great Northern Railroad Company, under the name of the ‘International & Great Northern Railroad Com-

Statute conferring exemption.

pany ;' whereas, on the fifth day of August, 1870, the legislature of the state of Texas passed an act entitled 'An act to incorporate the International Railroad Company, and to provide for the aid of the state of Texas in constructing the same ;' and whereas, by the 9th section of said act, it is claimed the state of Texas obligated itself to donate and grant to the said company the bonds of the state of Texas to the extent and amount of ten thousand dollars per mile for each mile of railroad constructed under said charter ; and whereas, the said railroad company has already constructed about two hundred miles of railroad, in accordance with the provisions of its charter ; and whereas, the said International Railroad Company has been consolidated with the Houston & Great Northern Railroad Company, under the name of the 'International & Great Northern Railroad Company ;' and whereas, questions have arisen between the state of Texas and the said company as to the legal liability of the state to deliver said bonds to the said company ; and whereas, it is important both to the state and said company that these questions should be definitely settled by a just and reasonable compromise ; therefore, for that purpose,—Section 1. Be it enacted by the legislature of the state of Texas, that, in full settlement and satisfaction of all claims of the said the International Railroad Company, and of the said International & Great Northern Railroad Company against the state for bonds, under the provisions of the ninth section of the aforesaid act of August 5, A. D. 1870, there is hereby granted to the said last-named company, its successors and assigns, twenty sections, of six hundred and forty acres each, of the unappropriated public lands of the state, for each mile of railroad which has been and which may hereafter be constructed pursuant to the authority conferred by the said act of August 5, A. D. 1870. And the said company, its successors and assigns, shall have the right to locate the said lands as headright certificates were formerly located, without being under obligation to locate alternate sections for the state ; and the said lands, and the certificates issued therefor, are hereby exempted and released from all state, county, town, city, municipal, and other taxes for the period of twenty-five years from the date of the respective certificates issued therefor. And the said railroad company and its successors, and its and their capital stock, rights, franchises, railroads constructed and to be constructed, pursuant to the said act of August 5, A. D. 1870, and this act, rolling stock, and all other property which now is, or hereafter may be, owned or possessed by said company, or its successors, in virtue of the said act of August 5, A. D. 1870, is hereby exempted and released from all state,

county, town, city, municipal, and other taxes, for a period of twenty-five years from the 5th day of August, A. D. 1875, except county and municipal taxes, in such counties, cities, and towns as have donated their bonds to aid in the construction of said railroad; but this exception shall not remain in force in favor of any county, city, or town, which, having thus donated bonds, shall make default in the payment of either the interest or principal thereof: provided, that this exemption from taxation shall not be held or construed to include or apply to the lands or railroads which at the time of the consolidation hereinbefore recited belonged to the Houston & Great Northern Railroad Company, or which has since been, or hereafter may be, constructed or acquired under its charter: provided, nothing in this act contained shall be so construed as to exempt from taxation any lands to which the company may be entitled by virtue of the charter of the Great Northern Railroad Company, or the franchise, roadbed, rolling stock, or any property acquired, or hereafter to be acquired, by virtue of the charter of the Great Northern Railroad Company." "Sec. 7. That a majority in amount of all the stockholders of the said the International & Great Northern Railroad Company shall in person or by proxy, at a meeting of the said stockholders held for that purpose, vote in favor of accepting the provisions of this act, and a certificate certifying that fact, under the common seal of said company, attested by its secretary, shall be filed in the office of the secretary of state within forty-five days after the approval of this act by the governor of the state; this act shall thereupon be and become obligatory upon said company and its successors; and, its provisions being complied with by the state, it shall be and constitute a full, final, and conclusive settlement of all the claims and demands of said company against the state for bonds, under the ninth section of said act of August 5, A. D. 1870; and this act shall also be held to constitute an irrevocable contract and agreement between the state and the said company, its successors and assigns."

The information alleges that the "state of Texas, by said last-named special act, granted to it, (the railway company), and it now enjoys, the said extraordinary exemptions, special privileges, immunities, and franchises from all state, county, city, town municipal, and other taxes on its said roadbed, rolling stock, and other property, in and from its said eastern terminus at Longview, Gregg county, in and through the aforesaid intermediate counties, and all the towns and cities thereof, to its western terminus at Laredo, in Webb county, and still claims the right to continue to enjoy said exemption until August, 1900." This contains a

clear recognition of the fact that all the requirements of § 7 of the act have been complied with, and that the exemption existed at the time the information was filed. The grounds on which the forfeiture of the company's charter, and its right to immunity from taxation, were asked, are thus summarized in brief filed for the state: "*First*, Grounds on which forfeiture are asked. that the respondent had willfully permitted its roadbed and rolling stock to get out of repair, so as to endanger the lives of its passengers, and to delay and retard, rather than to promote and facilitate, travel,—giving particulars; *second*, that it had failed to keep and maintain passenger and freight depots sufficient to accommodate the demands of the public, and that such as it did keep were low, flat, indecent buildings, totally unfit for railway purposes; *third*, that it had willfully diverted its corporate funds to other and different purposes, and was so incumbered by fictitious liabilities as to render itself unable to perform its public functions; *fourth*, that it failed to operate continuous and regular trains over its road from its eastern to its western termini, as it had agreed to do; *fifth*, that it had abandoned the use of its road, over which it had never run any trains of its own for a number of years, from Taylor westward,—a distance of several hundred miles,—which part of the road was exclusively used by other and different railway companies; *sixth*, that it had leased and sold out its whole corporate property and franchises to a parallel and competing railway company, and to a foreign corporation, in violation of its charter; *seventh*, that it had removed its general offices, domicile, and managing officers all out of this state into the city of New York, where they were maintained, not by itself, but by a foreign railway company; *eighth*, that it was operating in and under the control of the Texas Traffic Association, a combination of competing railways, for the purpose and effect of preventing competition between itself and others; *ninth*, that the officers of other competing railway companies controlled and managed the affairs of respondent exclusively; *tenth*, that it was without a *bona fide* organization at all in the state of Texas." Thus it is seen that the state bases its right to withdraw the immunity from taxation on no other ground than the failure of the company faithfully to exercise the powers conferred on it by its charter, in accordance with the laws of this state. The court below held that the failure of the corporation in this respect was not such as to justify the forfeiture of its charter, but that it was such as required a judgment declaring that its property should not have the immunity from taxation given by the act of March 10, 1875. The first conclusion of the court below,

for reasons before given, we cannot revise; and, if the immunity from taxation could be termed a "corporate franchise," we do not see how it could be withdrawn, until the term for which it was given expires, so long as the existence of the corporation continues, in the absence of something in the statute authorizing a partial forfeiture. There is nothing in the statute which authorizes this partial forfeiture.

We cannot now enter into an inquiry as to the inducement which may have led to the grant of the original charter to the International Railroad Company, nor into the validity of any claim appellant may have asserted against the state, which led to the compromise act passed March 10, 1875. All such questions were, no doubt, considered by the legislature, and the rights of the parties settled by the act referred to, and the acceptance of its provisions by appellant. The validity of the exemption from taxation has been considered in former cases, and need not now be again discussed. *International & G. N. R. Co. v. Anderson Co.*, 59 Tex. 654, 13 Am. & Eng. R. Cas. 660; *International & G. N. R. Co. v. Smith Co.*, 65 Tex. 21.

Looking to the provisions of the act of March 10, 1875, we think there can be no doubt that the exemption from taxation given by it, instead of being a right vesting only in appellant, is a right which inheres in the property to which it applies, and follows it into the hands of whomsoever may become its owner. The exemption is not given to a company named alone, but to its assigns and successors as well; thus evidencing an intention that the exemption from taxation should adhere to the property exempted, and follow it into the hands of whomsoever may become its owner. No such state of facts is shown in the following cases, to which counsel for the state refers, and on which it relies. *Morgan v. Louisiana*, 93 U. S. 217; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176; *Pickard v. East Tenn., V. & G. R. Co.*, 130 U. S. 637. These cases hold that exemption from taxation given to a named corporation will not inure to the benefit of another that may buy the property, or to a corporation formed from the consolidation of the one holding the exemption and another, in the absence of something showing an intention to fix the exemption on the property into the hands of whomsoever it may go. These decisions, however, are fatal to the proposition that exemption from taxation in such cases is, within the meaning of the law, a corporate franchise, though it may be a franchise owned by a corporation. The act in question,

Validity of exemption from taxation.

Exemption inheres in property and is not personal to company.

and its acceptance by the company, constitutes, as declared by the legislature, "an irrevocable contract and agreement between the state and the said company, its successors and assigns," based on consideration deemed by the legislature sufficient; and, under it the right to the exemption would continue, in favor of persons or corporations who may become the owners of the property to which the exemption applies, even though the appellant corporation should be dissolved by a decree declaring the forfeiture of its charter. The existence of this right enhances the value of the property to which it applies. Shareholders and creditors must be presumed to have dealt with the corporation on the faith of the contract which gave the exemption, and it cannot be taken away by legislation, by dissolution of the corporation, or in any other manner not sufficient to pass title to any other property from one person to another. The right to exemption from taxation is secured by the same guaranty which secures titles to those owning lands granted under the act, and, though the corporation may be dissolved, will continue to exist in favor of persons owning the property to which the immunity applies. Lawful dissolution of a corporation will destroy all its corporate franchises or privileges vested by the act of incorporation; but, if it holds rights, privileges, and franchises having the nature of property, secured by contract based on valuable consideration, these will survive the dissolution of the corporation, for the benefit of those who may have right to or just claim upon its assets. The court below erred in adjudging a forfeiture of appellant's immunity from taxation; and in so far its judgment will be reversed, and so much of the action as sought such relief will be dismissed, as ought to have been done by the court below, on demurrer. It is so ordered.

In re ST. PAUL, STILLWATER & TAYLOR'S FALLS R. CO.

(*Minnesota Supreme Court, January 8, 1890.*)

Exemption of Land Grant—Sale or Conveyance—Effect.—Lands embraced in a railroad land grant, and exempt from ordinary taxation while held by the corporation for whose benefit the grant was made, *held* to have become subject to taxation, the entire beneficial interest of the corporation having been conveyed by a trust deed, to secure a specified charge upon the lands exceeding their value, and the *cestuis que trustent* being empowered, at their mere election, to take and appropriate the entire property in satisfaction of their claims upon it, and so as to leave nothing to revert to the grantor.

CASE certified from Chippewa County.

Proceedings to enforce the payment of delinquent taxes for the year 1882, in Chippewa county.

Moses E. Clapp, Atty. Gen., and *Lyndon A. Smith* for the state.

Young & Lightner for defendant.

DICKINSON, J.—The matter now to be considered has been certified to this court, pursuant to the statute, by the Honorable C. L. BROWN, judge of the sixteenth judicial district, who, acting in place of the judge of the twelfth judicial district, determined, upon the case which is certified to us for review, that the lands in question were taxable. The principal controversy is as to whether by a trust deed, Exhibit E in the case, made by the St. Paul, Stillwater & Taylor's Falls Railroad Company on the 12th day of March, 1880, conveying the lands in question to E. F. Drake and A. H. Wilder, in trust for the purposes therein set forth, the corporation divested itself of the entire beneficial interest in the property, so that it became taxable as the property of the *cestuis que trustent*.

It appears from the case before us that long prior to the execution of this trust deed the corporation had issued and sold its bonds to secure money for the construction of its road; such bonds being secured by a mortgage or trust deed of the railroad constructed, or to be constructed, of the railroad property in general, and of the land grant. Subsequently, by agreement with the bondholders, such bonds were retired, the bondholders accepting in place of such bonds and mortgage—*First*, new bonds of the company, to the amount of 60 per cent. of the former debt, secured by a new trust deed of the railroad property and franchises; and, *second*, "preferred special land stock," as it was called, to the amount of 40 per cent. of the former debt, this being secured by a further trust deed or second mortgage upon the railroad property, and by a trust deed of the land grant. Thus the matter stood at a time of the transaction more immediately in question, March, 1880. At that time the corporation negotiated a sale of its railroad and railroad property to the St. Paul & Sioux City Railroad Company, which sale was finally accomplished. In order to free the railroad property from the incumbrance created by the trust deed securing the so-called "preferred special land stock," a new "special land stock," so called, was issued by the corporation for the amount of the former preferred special land stock outstanding, \$204,900, of the par value of \$100 per share; and this was secured by the trust deed, Exhibit E, executed

to E. F. Drake and A. H. Wilder. The holders of the bonds and of the former preferred special land stock received this new special land stock thus secured, with a bonus of about 10 per cent. paid in cash, in exchange for their former land stock, which was thus retired. The following is a summary of such of the provisions of this trust deed to Messrs. Drake and Wilder as bear particularly on the matter in controversy: It recites the contemporaneous issue of this special land stock, of the aggregate par value of \$204,900, for the purpose of retiring that before issued. It recites the agreement of the corporation that the net cash receipts from the sale of the lands embraced in this deed should be applied to the redemption and retirement of such special land stock, and that such stock should at all times be receivable, at its par value, in payment for any of said lands, at the current selling or appraised value, which should not in any case be less than an average price of six dollars per acre, except by order of a majority of the holders of said stock. For the declared purpose of securing the performance of such agreements, the corporation, by this instrument, conveyed to the trustees named, parties of the second part, and to their successors, all the land of the corporation in the counties of Chippewa and Renville, amounting to some 41,926 acres; the same being lands granted to the corporation to aid in the construction of its road. Among the conditions and purposes of the trust, as further set forth in the instrument, are the following: The trustees were to hold, manage, bargain, and sell any and all of said lands, prescribe the price at which they should be sold,—the same not to be less than an average of six dollars per acre, unless on order of a majority of the holders of such stock. The proceeds of the sales of the land were to be devoted—*First*, to the payment of the expenses attending the trust; *second*, at stated semi-annual periods, if the proceeds were not sufficient to pay dividends of at least one per cent. on this stock, they should be carried to the credit of a redemption fund. If they were sufficient to pay a dividend of at least 1 per cent., they should be so paid,—such payment, however, not to exceed a dividend of 5 per cent. in any six months, the surplus, if any, to be carried to the credit of the redemption fund; *third*, whenever the redemption fund should be sufficient to take up 10 or more shares of stock at a price not greater than its par value, it should be applied in paying off and retiring stock, in a manner particularly pointed out. It is further provided in this instrument that when all the special land stock shall have been redeemed by the operation of the redemption fund, with interest thereon as provided therein, and the expenses of the

Provisions of
trust deed.

trust shall have been paid, this conveyance shall become void, and the residue of lands, moneys, or contracts shall revert to the corporation. It appears that there is still outstanding about \$25,000 of this same stock, and that there remain undisposed of 2,500 acres of the trust lands. It was found by the court below, upon evidence which was sufficient to justify the finding, that at the time of the execution of this trust deed the value of the land conveyed did not exceed four dollars an acre,—a sum considerably less than would be necessary to be realized in order that the proceeds of the land should pay off this so-called "land stock," irrespective of dividends. The court also found as a fact that at the time of the execution of this trust deed, and of the issuance of this land stock, it was not the expectation nor intention of the parties that there would or should be any residue of lands, or of the proceeds of the lands, to come to the corporation; that the corporation intended to and did grant to the trustees named, for the use and benefit of the holders of the land stock, the entire beneficial interest in these lands,—the corporation retaining a mere form of ownership and right of redemption, without any expectation or intention that its right should be made available for any purpose. It was therefore considered that the lands were taxable.

If the finding of the court as to the intention of the parties in this transaction was justified, and if this trust was sus-

Effect of trust
deeds—Absolute conveyance.

ceptible of being administered, according to its terms, so that, at the mere will of the *cestuis que trustent*, the whole property should be appropriated to the satisfaction of their claims upon it, the conclusion of the court was right. St. Paul & S. C.

R. Co. *v.* McDonald, 34 Minn. 182, 22 Am. & Eng. R. Cas. 208; St. Paul & S. C. R. Co. *v.* Robinson, 40 Minn. 360, 39 Am. & Eng. R. Cas. 502. In its essential and controlling features, this case is substantially like that of Railroad Co. *v.* Robinson, last cited. Taking into consideration the value of these lands, it seems apparent that by the terms of the trust deed the corporation placed it in the power of the holders of this land stock to at once distribute the whole property among themselves, to satisfy their demands, or to sell it, as speedily as possible, at its actual value, which not only would leave nothing to revert to the corporation, but would fail to fully satisfy the land stock, with its accumulating dividends. The stock was at all times receivable at its par value in payment for lands at the current selling or appraised value, which should not in any case be less than an average price of six dollars per acre, "except by order of a majority of the holders of said stock." If the majority of the stockholders were

to so order, the price might have been put at the real value at that time, of four dollars per acre; and the corporation, which had reserved to itself no voice in the matter, could have had no reason for seeking to restrain the carrying into effect of such an order fixing the price at the actual value of the land. Such action would not have wronged the corporation, would have involved no element of fraud, and would have afforded no ground for equitable interference at the suit of the company. Nor does it appear that from that time to the present there has been any change, such as to have affected the rights of the parties in this respect, in the relative value of the lands, as compared with the amount of the outstanding land stock. It seems apparent, then, that at the time of the conveyance of these lands in trust the *cestuis que trustent* acquired, and the company parted with, the entire beneficial interest in the property; and that by the very terms of the grant the beneficiaries were empowered to surrender their stock and take the land, or to cause it to be sold for their benefit; and that, whether the trust should be carried into effect in one way or in the other, there would be nothing to revert to the grantor. The holders of this stock, as we understand, could look only to this land for its satisfaction; and it must be assumed that either by direct appropriation or by sale it would be applied to their benefit. That the stockholders did not elect at once to make such application, or did not succeed at once, or speedily, in selling the land, does not modify the effect of the fact upon which the claim of the state rests, that the entire beneficial interest in these lands had passed to the holders of this land stock. The court was justified in finding that the intention of the parties was to accomplish that which was the natural and immediate effect of the very terms of the agreement and grant.

We have referred to the value of the lands, as having a bearing upon the case. It is not to be understood that we deem the actual value in such cases to be of controlling importance; for the intention of the parties should be considered, with reference to the value which the parties may have supposed the property to bear. But this case was such that the trial court may have been justified in the conclusion that the parties to the transaction did not estimate the available value of the land, beyond what has been found to have been its actual value. The testimony of Mr. Drake and Mr. Jewett may be accepted as true, showing that such lands as have been sold have actually brought an average price of six dollars an acre. And so of the testimony of Mr. Drake, that he has always regarded the land as of that value. "Not," as he adds, "that they could be sold out in a day at that, or, per-

haps, in a month or a year, but the average value, as people would buy them and as they would want them." The present value of unproductive property is necessarily less than the sum for which it may be sold in the course of a period of years. And, again, the available value of this land, so far as could concern this corporation, was to be considered with regard to the speediness with which it could be disposed of; for it was charged with this land stock, which was entitled to receive dividends out of the proceeds of the sales. In a very important particular this case is distinguishable from *Sioux City & St. P. R. Co. v. Robinson* (Minn.), 39 Am. & Eng. R. Cas. 510, and the distinction is pointed out in the opinion in that case, wherein the difference between it and the case of *St. P. & S. C. R. Co. v. Robinson*, 40 Minn. 360, 39 Am. & Eng. R. Cas. 502, is referred to. The case now under consideration is substantially like that last cited, in that the trust deed in question, and the land stock certificates, were executed with a view to their acceptance by particular persons, the holders of the bonds and preferred special land stock previously issued, who were really the parties contracting directly with the corporation in this transaction. We see no reason why they should not be deemed to have participated with the corporation in the intention deducible from the transaction; that is, that the whole beneficial interest in the land should inure to them. The conclusion of the court below that the lands became taxable is sustained.

As respects the particular lands which are chargeable with taxes in this proceeding, it is claimed that the order of the court is in terms so broad as to cover lands which, as we understand from the concession in the brief on the part of the state, are not claimed to be included in this proceeding. It is conceded, as we understand, that judgment should be entered only against the lands, and for the taxes named in Exhibit B, found on page 93 and following pages of the paper book. The order for judgment will be modified accordingly.

It is also claimed that a statutory penalty of 10 per cent. is charged in the list above referred to, and in the order of the court for judgment, and that this is erroneously included under our decision in *State v. Lands in Redwood Co.* (Minn.), 42 N. W. Rep. 473. It is, perhaps, inferable from the brief on the part of the state that this, too, is admitted, but this is not entirely clear, nor do we understand the facts to be so fully disclosed by the record before us as to enable us to apply to this case the rule declared in the decision last cited; and, as this matter does not seem to have been called to the attention of the district court it is left to be determined by that court, upon applica-

Statutory
penalty.

tion for a modification of the order for judgment in this particular.

Exemption from Taxation—Effect of Sale or Conveyance of Lands Granted.
—See *St. Paul & S. C. R. Co. v. Robinson* (Minn.), 39 Am. & Eng. R. Cas. 502, note 509.

STATE

v.

ST. PAUL, MINNEAPOLIS & MANITOBA R. CO.

(*Minnesota Supreme Court, December 26, 1889.*)

Taxation—Hotel at Summer Resort—The Lafayette Hotel, owned by a railroad corporation, and kept by its lessee as a hotel and place of summer resort, *held* not included within the exemption from ordinary taxation enjoyed by the corporation in respect to such of its property as is held and used for railroad purposes.

APPEAL from District Court, Hennepin County.

In the matter of the proceedings to enforce the payment of taxes in Hennepin county. On the hearing the trial judge filed the following findings of facts and conclusions of law:

“The court having heard the testimony of the respective parties, and the arguments of counsel, and having duly considered the same, find the following facts proven or admitted by the parties on the trial of said cause:

FINDING OF FACTS.

“(1) That the defendant, the St. Paul, Minneapolis & Manitoba Railway Company, is, and was at the time stated in the answer herein, a corporation, created, existing, and doing business in this state under and by virtue of the authority, and in the manner and for the purposes, set forth in said answer. That the defendant, prior to 1886, constructed a branch of its said railway from its main line, from near Wayzata, on the north shore of Lake Minnetonka, in the county of Hennepin, to ‘Minnetonka Beach,’ so called, and beyond that point, and has ever since and now does operate said road in the summer season, running trains over the same from April to October of each year. That the trains are run for the accommodation of persons who are residents of the cities of St. Paul and Minneapolis, a large number of whom have cottages near said lake, and reside in them during the summer season with their families, and others who resort there for pleasure or comfort, or both; many of whom are guests at the hotel hereinafter referred to. That the defendant was,

prior to the 1st of May, 1886, and ever since has been, the owner of the following described real estate, lying and being in said county of Hennepin, to-wit: That part of lots six (6) and seven (7) lying between and bounded by the land platted in Minnetonka Beach, and extending northeast from the north side of the Minnetonka branch of the St. Paul, Minneapolis & Manitoba Railway between Cottage Place and Lafayette Place to Crystal Bay, situated in government section 16, township 117, range 23. That the defendant, prior to the date last aforesaid, erected a large and commodious hotel on said described premises, known as the 'Lafayette Hotel.' That the railway tracks of said branch road are constructed alongside said described premises, and near to said hotel. That on adjacent property of the defendant, near by said hotel, the defendants have erected and maintain a passenger station for the accommodation of people who resort to said hotel, cottages, and lake; also a refreshment stand for the reception of travelers, and grounds for the reception and amusement of the same. That said hotel and its appurtenances are separate and distinct from said passenger station and refreshment stand. That said hotel and the grounds and appurtenances connected therewith were in 1886, and ever since have been, rented by the defendants during the summer season of each year for hotel purposes, open to the public generally, and has been and is used and occupied as a summer resort, opened to the public between the 20th day of April and the 10th day of September of each year, and closed for the balance of the year. That said hotel is and has been rented by the defendant each year to the person who has conducted the same, and received as rent therefore a certain percentage of the profits of the business, which amount so received for rent is insufficient to pay the insurance and the expenses of keeping the property in repair. That more than 90 per cent. of the persons who stop at and patronize the hotel come to and return from there on defendant's railway. That the hotel is of great convenience to the people who go to that side of the lake by means of the defendant's railway, as well as to those who come there by other means of conveyance, and that it contributes to the business and income derived from the defendant's business. That the receipts of the hotel are not included in or returned by the defendant in its statement to the state authorities of the gross earnings of its road, for the purposes of taxation, under the provisions of its charter. That the hotel is not in any way used in connection with the operating of the defendant's railway, except as a place for the people who travel over said railway to that point to stop, and that it is not kept exclusively for that pur-

pose, but it is opened, kept, and used for the accommodation of all guests and travelers, whether they are such as arrive and depart on the defendant's trains, by boats, or any other mode of private or public conveyance. It is kept for the entertainment and lodging of all who may apply, the same as any other public house or hotel, during the time it is open.

"(2) That said property was assessed in due form in 1886, by the proper officers of the town of Medina, in said county, the town in which said described property is situated, for the purposes of taxation for the years 1886 and 1887. That there was duly levied upon and extended against said property, for the year 1866, the sum of \$348.83 tax, including the costs and interest and penalty thereon at the time the same became delinquent. That there was duly levied upon and extended against said property, for the year 1887, a tax of \$352.61, including costs, interest, and penalty, up to the time it became delinquent. That said taxes, nor any part thereof, have been paid.

"(3) That by the act of the legislature incorporating the defendant, and under which it operates its said railroad, it was provided therein that the defendant, upon its paying into the state treasury, for the use of the state, on or before the 1st day of March in each year, 3 per centum of the gross earnings of its said railroad for the year ending on the last day of the preceding December, be exempt from all assessments and taxes of every kind, of state, county, town, or municipal taxation, upon all of the stock of said company, whether belonging to said company or individuals, and upon all of its franchises or estates, real, personal, or mixed, held by said company. That the defendant paid into the state treasury for the years 1886 and 1887 the full amount of the 3 per centum of its gross earnings.

"(4) The court finds that the other allegations in the defendant's answer, which are not herein found as true, were not proved.

" CONCLUSIONS OF LAW.

"That the plaintiff is entitled to judgment against the above described property for the sum of \$352.61, the amount of taxes for the year 1887, including penalties and costs accrued at the time the list of delinquent taxes for that year was filed with the clerk of this court, and interest on the same from that date at the rate provided by law, and its costs and disbursements in this action. It is ordered that judgment be entered accordingly.

Benton & Roberts and *M. D. Grover* for appellant.

Robert Jamieson, Co. Atty., and *Frank M. Nye*, Asst. Co. Atty., for the State.

DICKINSON, J.—Upon the facts set forth in findings of the district court, we are called upon to review its decision holding that the Lafayette Hotel property at Lake Minnetonka, owned by the above named railroad company, is subject to taxation in the ordinary manner, not being exempt therefrom under the charter provision of that corporation relating to the payment of a per centum of its gross earnings in lieu of other taxation. The decision of the district court should be sustained. In principle this case is not distinguishable in any particular favorable to the railroad company from that of *County of Todd v. St. Paul, M. & M. R. Co.*, 38 Minn. 163. We refer to our opinion in that case, and to the authorities there cited, as being applicable to the question now under consideration. See, also, *State v. Northern Pac. R. Co.*, 39 Minn. 25; *State v. Baltimore & O. R. Co.*, 48 Md. 49, 77, 78; *Bank of Commerce v. Tennessee*, 104 U. S. 493; *Chicago, M. & St. P. R. Co. v. Cranford Co.*, 48 Wis. 666, 675, and cases cited. The hotel was constructed and is owned by the railroad company. It is rented by the company and used by the lessees for general hotel purposes, and as a place of summer resort. The only connection or relation between the hotel business and the proper business of the railroad company, as a carrier of passengers and freight, is that it contributes largely to increase the volume of travel over the railroad; nearly all of the visitors and guests at the hotel taking passage to and from that place over this line of road. That fact, which is relied upon in support of the claim that the hotel is reasonably and properly a part of the railroad business, necessary to its maintenance, does not justify that claim. The hotel business is in its nature wholly distinct from that for which the railroad corporation was created. It bears no other relation to railroad operations than does any enterprise which may promote travel or bring goods into the channels of commerce. But the railroad company cannot employ its capital in every such collateral and distinct enterprise as may thus promote its business as a common carrier, and claim, as attaching to such investments, the peculiar exemption from the ordinary burden of taxation which may be accorded to its property which is devoted to the proper business of a common carrier. See authorities above cited. Whether an hotel, kept by a railroad company for the reasonably necessary and proper accommodation of its passengers as such, would be exempt, we do not decide, for this is not such a case. This hotel, as we understand, both from the findings of the court and from the argument of counsel, is not for the purpose of ministering to the comfort and needs of passengers in the course of travel, but is

Taxation of
hotel.

kept as an hotel for the general accommodation of the public, and more particularly as an attractive place of summer resort. The distinction is illustrated in *State v. Railroad Co.*, and in *Railway Co. v. Board*, *supra*, and cases cited. It does not affect the case that the sole purpose of the railroad company is by this means to increase the amount of travel over its road. The means employed consist in the investment and use of property in a kind of business, wholly distinct from, and bearing no proper relation to, that of a common carrier. The decision of the district court is affirmed.

CHICAGO & ALTON R. CO.

v.

PEOPLE, *ex rel.* COLEY, Treasurer.

(*Illinois Supreme Court, April 5, 1889.*)

Taxation—Railroad Track—Branch to Stone Quarry.—A track about 1500 feet in length, extending from the main track of a railroad company to a stone quarry used for the sole purpose of obtaining stone for ballast, is "railroad track," within the meaning of the Illinois statute, which declares that the "right of way including the superstructures of main, side or second tracks and turnouts, and the station and improvements of the railroad company on such right of way shall be "denominated 'railroad track'" and shall be assessed by the state board of equalization, and is not real estate other than railroad track which is assessable by the local assessors.

SHOPE and MAGRUDER, JJ., dissent.

APPEAL from County Court, Pike County.

Application for judgment for delinquent taxes. Objections filed to the application were overruled, and judgment rendered. Company appeals.

A. C. Matthews and *Wike & Higbee* for appellant.

W. E. Williams, State's Atty., and *Orr & Crawford* for appellee.

CRAIG, C. J.—The main track of the Chicago & Alton Railroad Company is located across the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 10, township 7, range 2 W., in Pike county, and the right of way over this land is 200 feet wide, Facts. the track running nearly east and west. North of the main track, and commencing a short distance west of the tract of land in question, there is a side track running east, and gradually curving to the north, known as the "Quarry Track," and some 1,471 feet in length. This side track leaves the right of way of the main track about half way across the tract

of land above mentioned. The side track has a right of way of 100 feet, or 50 feet on each side of the center of its track. There is also a branch of this side track between it and the main track, known as the "Screening Bin Track." The railroad company in March, 1882, purchased 8.9 acres of land in the northwest corner of said 40 acre tract, joining its right of way, upon which there is a stone quarry. North of the railroad track the company erected a large frame building, a part of which stands upon the right of way of the main line, and a part on the right of way of the side track, known as the "Quarry Track." The building contains two stone crushers. The stone blasted from the quarry on the 8.9-acre tract is carried into this building on the quarry track, and crushed, and then used to ballast the roadbed of the railroad. There is also an engine and boiler house northwest of the building, located on the right of way of the side track. In May, 1887, the defendant company returned to the county clerk of Pike county a schedule, sworn to, showing, among other things, property held for the right of way, and the length of the main and all side and second tracks on the tract of land first above mentioned, which included the main track, and all the side tracks and rights of way above mentioned; and also stated the value of the superstructures and improvements thereon, as above described. Said company also returned a list of its real estate in said township other than that denominated "railroad track," which included the 8.9 acres of land above mentioned, less the right of way of the side track; and also a list of its personal property, as required by law. The township assessor assessed the whole of the 8.9-acre tract as land, and the state board of equalization assessed that part of said track used as right of way for the side or quarry track as railroad track. The company paid the taxes assessed by the state board, but refused to pay on the assessment made by the local assessor, in so far as the land occupied by the side track was involved. The county collector of Pike county made application for judgment against the land to pay the taxes in the amount made by the local assessor, and on the hearing judgment was rendered in favor of the collector, to reverse which the railroad company appealed.

The question presented by this record is whether the strip of land 100 feet wide, and 1,472 feet in length, extending from the main track in and to the stone quarry, known as the "Quarry Track," is within the meaning of the revenue law, railroad track, or is it real estate of the railroad company other than railroad track?

Track to
quarry is tax-
able as rail-
road track.

If it is the former, then it was lawfully assessed by the state board of equalization, and the local assessor had no

authority to assess it; if the latter, then it was within the power of the local assessor to make the assessment, and the judgment of the county court sustaining the assessment, and rendering judgment against the property for the tax, was right. Section 41 of the revenue act (Rev. St. Ill. chap. 120) provides that railroad companies shall, in the month of May in each year, when required, make out and file, with the county clerks of the respective counties in which the railroad may be located, a statement or schedule showing the property held for right of way, and the length of the main and all side and second tracks and turnouts in such county; giving the width and length of the strip of land held in each tract through or into which said road may run, and the number of acres thereof. They shall also state the value of improvements and stations located on the right of way. Section 42 provides: "Such right of way, including the superstructures of main, side, or second track and turnouts, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued." Section 47 provides: "The county clerk shall return to the assessor of the town * * * a copy of the schedule or list of the real estate (other than 'railroad track;') and of the personal property (except 'rolling stock'), pertaining to the railroad, and such real and personal property shall be assessed by the assessor." Section 48 provides that the railroad company shall return to the auditor a schedule "of the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county," etc. Section 109 provides that the state board of equalization shall assess the railroad property denominated "railroad track" and "rolling stock," and the amount so determined and assessed shall be certified by the auditor to the county clerk.

From these provisions of the revenue law, it is manifest that the local assessor has not been clothed with power to assess railroad track, and that the assessment of such property can only be made by the state board of equalization. By the terms of section 41, it is seen that the railroad company is required to return a schedule, showing the property held for right of way, the length of the main and all side and second tracks and turn-outs. This section is followed by 42, which declares that such right of way shall be held to be real estate, for the purposes of taxation, and denominated "railroad track," and shall be so listed and valued. The right of way spoken of in these two sections is not limited to the right of way of the main track, but embraces the right of

way of all side-tracks and turn-outs as well. In discussing this question in *Chicago & A. R. Co. v. People*, 98 Ill. 354, 5 Am. & Eng. R. Cas. 94, we used the following language: "We can see no reason why the term 'right of way' should be confined to the land over which the main track of a railroad should be constructed. The land upon which a side track, a switch, or a turn-out is built, and in actual use by the company in the business for which it was organized, for all practical purposes is as much held for right of way as is the land upon which the main track is constructed. * * *

We are therefore of the opinion that the land held and in actual use by a railroad company for side tracks, switches, and turn-outs must be regarded, within the meaning of the revenue law, as a part of the right of way of the company." In *Chicago & N. W. R. Co. v. Miller*, 72 Ill. 144, town lots alleged to be used as right of way by a railroad company were held to be railroad track, and not subject to assessment by the local assessor. It is there said: "We must take the averment in this bill that these lots are used by appellant as right of way, confessed as it is by the demurrer, to be true. It then follows that, under the forty-second section, they fall under the denomination of 'railroad track,' and we perceive no authority to assess them otherwise." In *Ohio & M. R. Co. v. Weber*, 96 Ill. 448, 5 Am. & Eng. R. Cas. 101, it is held that under our statute the property of railroads, for the purpose of assessment, is classified, and specific names are adopted to designate all the property embraced in a class; that the term "railroad track" embraces property held for right of way, including superstructures thereon. In *Chicago & A. R. Co. v. People*, 98 Ill. 354, 5 Am. & Eng. R. Cas. 94, 32 acres of land, in actual use by the railroad company in the operation of its railroad, was held to be railroad track, and not liable to be assessed by the local assessor. This decision was followed and approved in *Chicago & A. R. Co. v. People*, 96 Ill. 466, 6 Am. & Eng. R. Cas. 627, where it was held where a lot is returned by a railroad company in its list as being used for tracks, side tracks, etc., in connection with the road and for railroad purposes, and the board of equalization assess the same, an assessment by the local assessor will be a double assessment, and the tax extended upon such assessment will be illegal. It was also held that, where only a portion of a lot is used for railroad purposes, to that extent it is properly returnable to the board of equalization for assessment. In *Peoria, D. & E. R. Co. v. Goar*, 118 Ill. 136, 29 Am. & Eng. R. Cas. 189, the rule announced in *Chicago & A. R. Co. v. People*, 98 Ill. 350, 5 Am. & Eng. R. Cas. 94, was again approved, and it was held that under the revenue law, the exclusive

power to assess railroad track—which includes right of way, with the superstructures of main, side, or second track and turn-outs, and the station and improvements thereon—is conferred upon the state board of equalization, and therefore an assessment of the property used as railroad track by the local assessor is void.

Upon the hearing in the county court it appeared from the evidence that 100 feet was the necessary and proper width of the right of way for the quarry track. It also appears that the rock quarried and brought in on the track is crushed in the building provided for that purpose by the company, and used to ballast the Chicago & Alton Railroad; that the ballasting is a necessary part of the work of keeping the road in repair. The question, then, is whether a side track, as the quarry track is but a side track, when constructed by a railroad company, and used for the sole purpose of keeping the roadbed in proper repair, is to be regarded, within the meaning of the revenue law, as railroad track. Under the former decisions of this court, we think it is. If land upon which a railroad company may erect machine shops, car shops, round-houses, where repairs are made for the company's rolling stock, may be regarded as railroad track, for the same reasons and upon the same principle, a quarry track, constructed for the sole purpose of providing material to keep the roadbed in proper repair, may be regarded as railroad track. This side track was necessary to enable the railroad company to properly operate its line of road under its charter. If the line is to be operated with due regard to a safe shipment of property, and the safety of the life of the passenger, the roadbed must be kept in good condition. In conclusion, we think the local assessor had no power to assess the quarry track, and the county court erred in rendering judgment for the tax arising from such assessment. The judgment of the county court will be reversed, and the cause remanded.

SHOPE and MAGRUDER, JJ., dissent.

INDIANAPOLIS & ST. LOUIS R. CO.

v.

PEOPLE.

(Illinois Supreme Court, October 31 1889.)

Taxation—Omission of Property from Schedule—Estoppel.—Where a railroad company has omitted property from the schedule of property returned by it for assessment by the state board of equalization as railroad track, it is estopped from asserting that such property should have been included as railroad track, and therefore is not assessable by the local assessor, when no offer is made in its behalf to show, that notwithstanding the omission, the property had been assessed by the board of equalization.

ERROR to County Court, St. Clair County.

This was a proceeding by James D. Baker, collector of St. Clair county, to obtain judgment for delinquent taxes for the year 1886 against real estate described as "total real estate other than track, Schedule D, lot 5a, survey 780, 18 acres." Plaintiff in error objected, on the ground that said real estate was "a part of, and included in, the right of way between East St. Louis terminals of said company." On the hearing the collector objected to the introduction of testimony in support of said objection, on the ground that said defendant company was estopped to urge the same in this proceeding because the schedule returned by it to the county clerk of said county, in accordance with the provisions of § 41, chap. 120, Rev. St., did not contain a statement of the property on which said tax was assessed, a copy of which schedule was filed with the objection. This schedule, by its heading, states that in accordance with the provisions of the statute the company "makes return of its property for taxation by schedule as follows: Schedule marked 'A' shows the property designated by law railroad track. * * * Schedule marked 'B,' * * * rollingstock. * * * Schedule marked 'C,' tools. * * * Schedule marked 'D' shows all real estate, other than railroad track, belonging to or controlled by this company, its location, and listed value." To this caption schedules marked "A," "B," and "C" are attached. Schedule D does not appear. To this return the vice-president and assistant secretary of the company make affidavit, stating "that the foregoing schedules, marked 'A,' 'B,' 'C,' and 'D,' contain, and are a full, true, and correct exhibit of, all the property owned or controlled by said company which is located in the county of St. Clair, state of Illinois." The objection to the

offered proof was sustained, and judgment rendered in favor of the collector, from which this writ of error is prosecuted.

E. C. Rhoads and John T. Dye for plaintiff in error.

M. W. Schaefer for defendant in error.

WILKIN, J.—It is not claimed that lot 5a, survey 780, was included in the schedule marked "A." There is nothing in the record tending to show that it was not included in Schedule D, and therefore the presumption that it was returned as real estate other than railroad track must obtain. It is not pretended that it was assessed by the board of equalization, or that any tax whatever has been paid on it for the year 1886. The proof offered on the hearing, and excluded, was to the effect that this lot was in fact railroad track, and used by the company as such. Its competency is based on *Chicago & N. W. R. Co. v. Miller*, 72 Ill. 147; *Chicago & A. R. Co. v. People*, 98 Ill. 357, 5 Am. & Eng. R. Cas. 94; and *People v. Railroad Co.*, 116 Ill. 181. All that is decided in these cases and the case of *Peoria, D. & E. R. Co. v. Goar*, 118 Ill. 134, 29 Am. & Eng. Corp. Cas. 189, is that property situated as this is claimed to be may be treated as railroad track, within the meaning of the revenue act; and that when used by a railroad company as such, and so scheduled, it is properly assessable by the state board of equalization, and not by local assessors. In each of the cases cited the property had been returned as railroad track, and so assessed; and it was sought by the proceeding below to subject it to double taxation, the local assessors having assessed it as real estate other than railroad track. In attempting to bring this case within the scope of these cases it is said: "Although this land is not included in the return of the company of its railroad track, that return is not binding on the state board of equalization, as that board is given power and authority, by committee or otherwise, to examine persons and papers, (§ 109, chap. 120;) and it is, of course, to be presumed that they discovered the omission, and assessed the road an additional sum per mile on account of this property." The fallacy of this position consists in the unwarrantable assumption that we will presume, in the absence of all proof, that the state board did detect the false return of the company, and did make an assessment of property which it did not schedule for assessment, and that the company can have the benefit of that presumption to relieve it from the payment of a tax assessed in conformity with its return. It was the duty of the company to make a true return of its property, and both the state board and the local assessor had a right to act upon the supposition that it had honestly discharged that duty; and

Omission
from schedule
—Estoppel.

the assessor was fully authorized, and it was his duty, to make the assessment for which the judgment below was rendered. There is nothing whatever in this record tending to show, nor did plaintiff in error offer to prove, any fact from which it could be inferred that the tax in question is unjust, or that it has been deprived of any right secured to it, as the owner of the property assessed, by law. Mere formal objections to taxes, not affecting unjustly the right of the citizen, cannot be allowed to defeat judgments for their collection. *Chiniquy v. People*, 78 Ill. 570; *Purrington v. People*, 79 Ill. 11. The attempt here is to escape the payment of a just tax through an irregularity (if, indeed, there is an irregularity) resulting from the negligent or wrongful act of the property owner. We think the court below properly applied the doctrine of estoppel in excluding the offered evidence. Its judgment will be affirmed.

STATE

v.

ST. PAUL UNION DEPOT CO.

(*Minnesota Supreme Court, December 6, 1889.*)

Taxation—Gross Receipts of Union Depot Company.—A company formed for the sole purpose of furnishing at cost a union depot and terminal facilities for the common use of several companies and whose only revenue is received in the form of tolls for the use of such depot and terminal facilities, which tolls amount in the aggregate only to the cost of operating the same, is not liable to pay as taxes a percentage on its receipts or gross earnings. Payment of a percentage on their gross earnings by the railway companies constitutes payment of taxes on all the property of the depot company.

APPEAL from District Court, Ramsey County.

Gordon E. Cole for appellant.

M. R. Tyler for respondent.

MITCHELL, J.—The sole question presented by this appeal is the liability of the defendant, under the act of March 10, 1873, (Gen. St. 1878, chap. 11, §§ 128, 129,) to pay, as taxes, a percentage on its receipts or gross earnings. It was organized under title 1, chap. 34, Gen. St., and the general nature of its business, as stated in its articles of incorporation, is "to build, purchase, or lease and operate transfer tracks or railways in the city of St. Paul, open alike to the use of all railroads now constructed, or which may hereafter be constructed, to or into St. Paul, to and between

Facts.

each of said roads, and each and all important industries in said city whose business requires special railroad accommodations by means of transfer tracks, etc., and in connection therewith to build, lease, or otherwise provide and maintain in said city a union passenger depot, and proper tracks for access thereto; and to that end to construct, purchase, lease, or otherwise secure, maintain, and operate lines of railway in said city." In connection with these articles, and as in fact a part of them, must be considered the act of March 5, 1879, "relating to the St. Paul Union Depot Company," the provisions of which were accepted by it, and under and in accordance with which its business has been managed. This act provided that any railroad then or thereafter constructed and running to or into St. Paul might subscribe to the capital stock of defendant, or become a stockholder therein. It also provided that the board of directors of the defendant should be elected annually by seven several railroad companies interested therein, each railway company electing one director. Also, that any other railroad company then or thereafter organized, whose road should run into St. Paul, might upon becoming the owner of such shares of the capital stock as defendant's board of directors should deem equitable, elect, in like manner, an additional director. The act also prohibited any unjust discrimination against or in favor of any particular railroad company using, or desiring to use, defendant's terminal facilities, and provided that as far as practicable all railroads should have the right to use them upon the same terms. It is evident that this act contemplated that the entire stock of defendant should be owned by and equitably apportioned among the various roads desiring to use its terminal facilities, for it is not to be supposed that the legislature intended that such railway companies should have the exclusive management of the corporate property and business while the stock should be owned by some one else. It is also apparent that it was never intended or contemplated that defendant should do what may be termed a "a separate and independent railroad business of its own," but that it was merely designed as an agency through which there might be furnished, for the common benefit and use of all railroads coming into the city, a union depot and terminal facilities, to better enable them to perform their duties as common carriers in receiving, delivering, and transferring passengers and freight in this city. In accordance with this act, all of the stock of defendant which has ever been issued was apportioned among and issued to, and has always been and still is owned and held by, the seven (since reduced, by consolidation, to five) railroad companies whose roads then ran into St. Paul, and who then used, and

still use, the depot and terminal facilities furnished by defendant, its entire board of directors being elected by the same companies. Two other companies, (Minnesota & Northwestern and Chicago, Burlington & Northern,) whose roads have subsequently been built into St. Paul, not yet having agreed with defendant's board of directors as to the terms upon which they should be admitted as stockholders, have been using the depot under an agreement by which they pay therefor a stipulated monthly rent, (apparently and presumably as the equivalent of interest on their equitable share of the cost or value of the plant,) and in addition thereto their proportion of the expenses (not including interest on bonds or dividends on stock) of maintaining and operating the depot and appurtenances. This plant was provided and constructed with the proceeds of stock issued to and paid for by these several companies, and with the proceeds of mortgage bonds issued and sold by the defendant. The greater part of the expense was, however, defrayed out of the proceeds of the mortgage bonds, only a comparatively small amount of stock having been issued. The rentals or tolls for the use of the depot are apportioned among and paid by the different companies in proportion to the amount of such use by each company, and the aggregate annual amount of all rentals and tolls is the actual cost of furnishing and maintaining the plant, estimated on the following basis: *First*. The current expenses of keeping up and maintaining the terminal facilities, and of managing the property and business, and 6 per cent. interest on the mortgage bonds, and an annual 6 per cent. dividend on the amount of paid-up stock outstanding; from which is to be deducted, however, all rents or income received by the depot company from other sources, such as rent of dining rooms, express rooms, news stands, and the like. The fares or tolls which the different railroad companies charge their passengers or other patrons include the use of these terminal facilities furnished by the depot company, as no distinction is or can practicably be made in that matter between their own roads and the depot of the defendant. For illustration, if a passenger on one of these roads pays his fare from Chicago to St. Paul, this covers the entire transit between the two cities, including the accommodations of the Union depot. Hence, for all the facilities furnished by the defendant to the railroad companies, and for which it charges them their respective shares of the cost, the railway companies charge their patrons as part of their service, and the whole goes into and forms a part of their gross earnings, upon which they pay to the state as taxes a certain percentage. All of the railway companies who use this Union depot pay to the state,

either under the provisions of their special charters, or under the act of March 10, 1873, a percentage on their gross earnings in lieu of taxes on all property held and used by them for railway purposes.

It is evident from this statement of facts that the sole and only function performed by the defendant corporation is to furnish, at cost, a union depot and terminal facilities for the common use of these different railway companies, and that the scheme of forming a corporation for that purpose, and issuing stock, is but a more convenient and economical method of holding the property and managing the business than it would be to hold and manage it as tenants in common. It is also apparent that what is charged the railway companies and received by the depot company for these terminal facilities is nothing more or less than a part of the expenses of the former in transacting their railway business, and what are called the "earnings" of the depot company are for services for which the railway companies charge their patrons, and are all included in the gross earnings of the companies, on which they pay a percentage to the state. To collect a percentage on these gross earnings, and also a percentage on the gross earnings of the depot company, would be, *pro tanto*, double taxation of the same thing. Or take another view of the case. The stock of the Union Depot Company represents and is the exact equivalent of all the property of that corporation. It is held by the railway companies, under legislative authority, for railroad uses, as fully as would be the depot itself if held by them as tenants in common. Hence payment of the required percentage on the gross earnings of the companies constitutes payment of taxes on this stock, and consequently on the property which it represents, and to tax the stock in the hands of the stockholders, and then tax the property which it represents against the corporation, would clearly be illegal or double taxation. The identity of the property taxed is not affected by the fact that in the one case the tax is paid by the stockholder and in the other by the corporation. The thing taxed is still the same. *Commissioners v. Bank*, 23 Minn. 280; *Farrington v. Tennessee*, 95 U. S. 679. If, in the present case, the taxes already collected from the railway companies, and those now sought to be collected from the depot company, were both the ordinary form of taxation, the fact of double taxation would be very apparent; but it is none the less double because in both cases the taxes are in the commuted form. Neither has the claim of the state in this case any equities. If the railway companies had owned and used this depot as tenants in common, the percentage on their gross earnings

Gross receipts
of depot com-
pany not tax-
able.

payable to the state would have been the same as now, and yet that percentage would have paid the taxes on the depot the same as on any other property held and used by them for railway purposes. We cannot see what difference it can make whether they hold the depot property as tenants in common, or put it in the name of a trustee to hold and manage for their common use, or, as in this case, organize a corporation for the same purpose, as a more economical and convenient method of holding the property, managing the business and apportioning the expenses among themselves. The state plants itself on the technical ground that defendant is a separate and independent legal entity, and that we have no right to consider the functions which it performs, or the relations which it bears to the railway companies who own its stock and use its depot. We think this is too narrow and technical a view of the case. When evasions have been resorted to by railway companies or others to escape taxation, we have unhesitatingly looked through the external form of dress to the substance of the transaction, and the same rule should be applied against the state. By receipt of the percentage on the gross earnings of all the railway companies who use the property of the depot company, and who own all its stock, the state has received its tax once upon all the corporate property of the defendant, and to tax it again by a tax against the depot company would be illegal, double taxation. We attach no importance to the fact that after its organization defendant's board of directors notified the state of its election to accept the provisions of the act of March 10, 1873. If it was liable to taxation, this notice might be conclusive on the company as to the mode or form of taxation; but there is nothing in it which would operate either by way of contract or estoppel to obligate it to pay taxes for which it would not be otherwise liable. Order reversed.

MAYOR, ETC., OF CITY OF NEW YORK.

v.

TWENTY-THIRD STREET R. CO.

(113 *N. Y.* 311.)

Taxation—Percentage of Gross Earnings in Lieu of License Fee—Amendment of Charter.—A statute which requires a street railroad company to pay to the city annually, a percentage of its gross earnings in lieu of a fee for each car used by it as required by its charter, is to be deemed an amendment of the charter in that respect, and is valid under constitutional and stat

utory provisions reserving the right to alter, suspend, or repeal the charter.

Same—Liability of Lessee of Railroad.—Where a corporation acquires by lease the property rights, privileges and franchises of a street railroad company, it takes them burdened with the latter's charter obligations, and although the lease contains no provision therefor, it is liable for a percentage upon the gross earnings of the road, which the charter provides must be paid into the city treasury.

APPEAL from General Term of the Supreme Court, First Department.

Action to compel the defendant to account for the gross receipts from the operation from the street railroad known as the "Bleecker Street and Fulton Ferry Railroad," and to pay to plaintiff the percentage thereon provided by law. The case was tried by the court without a jury, and an interlocutory judgment was rendered in favor of the plaintiff. The defendant made a motion for a new trial at the general term upon its exceptions, but the motion was denied. It thereupon appealed from the order denying the motion.

Leslie W. Russell for appellant.

Thomas Allison for respondent.

EARLE, J.—By chapter 514 of the Laws of 1860, Steven R. Roe and others were authorized and empowered to "lay, construct, operate, and use a railroad with a double or single track, as hereinafter provided, and to convey passengers thereon for compensation through, upon, and along" the streets mentioned. Some time prior to the 12th day of December, 1864, the Bleecker Street & Fulton Ferry Railroad Company was organized under the general railroad act of 1850 and the several acts amendatory thereof; and the route of its railroad, as set forth in its articles of association, was the same as that over which Roe and others named in the act of 1860 were authorized to construct and operate a railroad. On the 12th day of December, 1864, all the rights, privileges, and franchises conferred upon Roe and others by the act of 1860 were assigned and transferred by them to, and the same became vested in, the Bleecker Street & Fulton Ferry Railroad Company. By the act, chapter 199 of the Laws of 1873, the railroad company was authorized and empowered to extend its railroad, and by section 3 of that act it was, among other things, enacted as follows: In the construction, use, and operation by the said company of the tracks and extensions authorized by this act the company shall have and exercise the same rights and privileges which are now possessed and exercised under former grants and laws, and may use said road in connection with the roads of other railroad companies in said city, upon such terms as may be agreed upon between

Facts.

said companies and other railroad companies, and said company is hereby authorized to lease all or any portion of their said road, or to consolidate the same with any other railroad companies. The said company shall pay to the corporation of the city of New York a license fee of fifty dollars for each and every car used by them on said extension." A little more than a month later the legislature passed the act, chapter 647 of the laws of that year, which is as follows: "The Bleeker Street and Fulton Ferry Railroad Company, of the city of New York, shall in lieu of the payment to the corporation of the city of New York of a license of fifty dollars for each and every car used by said company, specified in section 3 of chapter one hundred and ninety-nine of the Laws of 1873, annually, on the first day of October, pay into the treasury of the city of New York one per cent. of the gross receipts of said company, the amount of which gross receipts shall be determined by the sworn statement of the president and treasurer of said company, but subject to the inspection of their books by the comptroller of said city: provided however, that said payment of one per cent. shall not commence to be computed until October first, in the year eighteen hundred and seventy-five, unless the extension of said railroad granted by chapter one hundred and ninety-nine of the laws of eighteen hundred and seventy-three shall be completed and in operation prior to said date; and in such case, then said computation of one per cent. shall commence from the date of such completion and operation of said extension of said railroad."

By the act, chapter 389 of the Laws of 1875, any railroad company was authorized to take a lease of all or part of the Bleeker Street & Fulton Ferry Railroad Company. provided the stockholders of that company holding a majority of its stock assented thereto. On the 10th day of January, 1876, the Bleeker Street & Fulton Ferry Railroad Company, as party of the first part, duly executed and delivered to the defendant, the Twenty-Third Street Railroad Company, as party of the second part, a lease, whereby it demised and leased to the defendant, its successors and assigns, the railroad of the party of the first part, and the extensions thereof "which the party of the first part is authorized to construct, together with all the property, real and personal, pertaining to and connected with said railroad and extensions, except its depot and stable grounds and premises held under lease from the mayor, aldermen, and commonalty of the city of New York, and the buildings thereon, now in use by the party of the first part; also all cars, horses, harness and rolling stock; also the rights, licenses, and privi-

Lease of railroad.

leges of the party of the first part, possessed and enjoyed under and by virtue of chapter 514 of the Laws of 1860, and chapter 199 of the Laws of 1873, and chapter 389 of the Laws of 1875, and of any and every act passed and to be passed amendatory thereof; to have, use, and hold the right and interest of the party of the first part in all and singular the above-demised premises, property, estate, effects, privileges, licenses, and immunities aforesaid unto the party of the second part its successors and assigns, from the day of the date hereof, for and during the term of ninety-nine years, yielding and paying therefor unto the party of the first part, its successors or assigns," in addition to a present consideration of \$50,000, to be applied towards liquidating the floating debt of the party of the first part, an annual rent as follows: An annual dividend of one and one-half of one per cent. upon the capital stock of the party of the first part, "it being understood that the dividends to be paid as aforesaid shall and may be paid directly to the respective stockholders," and "semi-annually the interest accruing and to become due and payable from and after the 1st day of July, 1876, upon seven hundred thousand dollars of first mortgage bonds, made by the party of the first part, and now outstanding." It was further provided that the party of the first part should during the continuance of the lease retain and keep its organization, and also as follows: And the party of the first part also covenants and agrees that upon the request of the party of the second part it will execute to any railroad company a lease of any portion of the railroad, or extension, or property herein referred to, on such conditions as the party of the second part may propose, or that it will join the said party of the second part in such leases." Under and pursuant to the lease, the defendant on or about September 29, 1876, entered upon the demised property; but it has operated only a portion of the road demised, the remainder thereof having been leased to and operated by other companies. A demand has frequently been made upon defendant and upon the Bleecker Street & Fulton Ferry Railroad Company for the statement required by the act, chapter 647 of the Laws of 1873, and for the payment of the percentage specified in that act; but such statement and payment have been refused, although the gross receipts from the exercise and operation by the defendant of the franchises and of the railroad have been very large. The courts below have held that the act, chapter 647 of the Laws of 1873, was a constitutional exercise of legislative power, and that the defendant is liable to pay the 1 per cent. of the gross receipts as therein specified. It is claimed on behalf of the defendant that the act, chapter 647 of the Laws of 1873, is un-

constitutional, and imposed no obligation upon the Bleecker Street & Fulton Ferry Railroad Company to pay the percentage therein specified. Section 1 of the act, chapter 140 of the Laws of 1850—the general railroad act,—provides that the corporations organized under that act shall be subject to the provisions contained in title 3, chap. 18, of the first part of the Revised Statutes; and among the provisions there contained is this: “The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, or repeal, in the discretion of the legislature.” Section 48 of that act also provides that “the legislature may at any time annul or dissolve any incorporation formed under this act:” and section 1, art. 8, of the constitution provides that “corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be obtained under general laws, All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.”

Under the power reserved in these acts and the constitution, the legislature was clothed with authority to require the payment of the percentage specified in the act, chapter 647. That act was an exercise of legislative authority, and must be deemed to be an alteration and amendment of the charter of the Bleecker Street & Fulton Ferry Railroad Company. It is difficult to put precise limits upon the power of the legislature thus reserved over corporations created by it, or under its authority. Under its reserved power it cannot deprive a corporation of its property, or interfere with or annul its contracts with third persons, (*People v. O'Brien*, 111 N. Y. 1;) but it may take away its franchise to be a corporation, and may regulate the exercise of its corporate powers. As it has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise. It may enlarge or limit its powers, and it may increase or limit its burdens. It is sometimes said that the alteration under such reserved power must, however, be reasonable, and it must always be legislative in its character, and consistent with the scope and objects of the corporation as it was originally constituted. Here, in the first instance, by the act, chapter 199 of the Laws of 1873, a license fee of \$50 for each car was considered a sufficient compensation to the city for the valuable franchise enjoyed by the corporation. But on further consideration the legislature concluded that it would be more convenient and beneficial to the city and a fairer

Power of legislature to require payment of percentage.

measure of the compensation which it should receive, that a percentage on the gross receipts should be paid, and this change the legislature was competent to make, within every authority that can be found in the books. 2 Mor. Priv. Corp. § 1093 *et seq.*; *Tomlinson v. Jessup*, 15 Wall. (U. S.), 454; *Miller v. State*, *Id.* 478; *Farrington v. Tennessee*, 95 U. S. 679; *Sinking Fund Cases*, 99 U. S. 700; *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528; *Close v. Glenwood Cemetery*, 107 U. S. 466, 1 Am. & Eng. Corp. Cas. 512; *Spring Val. Water-Works v. Schottler*, 110 U. S. 347, 2 Am. & Eng. Corp. Cas. 122; *Parker v. Metropolitan R. Co.* 109 Mass. 506; *Mayor, etc., of Worcester v. Norwich & W. R. Co.* *Id.* 113; *People v. Hills*, 46 Barb. (N. Y.), 340; *Schenectady & S. Plank-Road Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. C. R. Co. v. Dudley*, 14 N. Y. 336; *In re Oliver Lee & Co's. Bank*, 21 N. Y. 9; *Albany N. R. Co. v. Brownell*, 24 N. Y. 345; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499. We are therefore of opinion that the act referred to, requiring the Bleecker Street & Fulton Ferry Railroad Company to pay 1 per cent. of its gross receipts to the city, was constitutional and valid; and if that railroad company had continued to operate its road an action to recover the percentage could have been maintained by the city against it.

But the further objection is made that this defendant as the lessee of the Bleecker Street & Fulton Ferry Railroad Company, is not liable to pay the percentage mentioned. There is nothing in the terms of the lease which imposes this obligation upon it. What it is bound to do under the lease is expressly stipulated therein, and there is no stipulation or provision imposing upon it the duty or obligation to pay the percentage. There is nothing in the General Laws of the state which imposes this burden upon the defendant as lessee. By chapter 199 of the Laws of 1873 the Bleecker Street & Fulton Ferry Railroad Company was authorized to lease its road, or any portion of it; also by chapter 389 of the Laws of 1875 any railroad company was authorized to take a lease of all or any portion of its railroad; but neither of those acts imposes upon the lessee any express obligation whatever; and we know of no general rule of law by which the defendant as lessee became obligated to pay this percentage exacted by the state from its lessor. We cannot, therefore, find the defendant's obligation to pay this percentage in any particular language used in the lease, or in any statute. But we think it may nevertheless be found in the essential relations existing between the defendant and the lessor corporation. The gross receipts mentioned in the act of 1873 were the gross receipts of the Bleecker

Obligation of
lessee to pay
percentage.

Street & Fulton Ferry Railroad Company, received for fares upon its road. It could have no other receipts, and 1 per cent. of those receipts it was bound to pay to the city of New York; not a sum equal to 1 per cent., but so much of the gross receipts. Hence it would receive 1 per cent. of all the fares paid to it to and for the use of the city, under the obligation to pay it to the city. This was a charter obligation. The entity called a corporation consists of the sum total of all its charter powers and rights, and all its charter obligations and duties, and such powers and rights cannot be effectually divorced from such obligations and duties. The latter are correlatives to the former, and constitute the consideration for the corporate franchises, and their performance may be exacted as a condition of corporate existence. Hence when the defendant took the property, rights, privileges, and franchises of the Bleeker Street & Fulton Ferry Railroad Company it took them burdened with its charter obligations. Taking the place of that company as to its charter powers and rights, it necessarily took its place as to its charter obligations and duties. It could not have and exercise the former without discharging the latter. A *quasi* public corporation without any charter duties is inconceivable, and so it is inconceivable that any one could acquire by acts *in pais* the charter rights without at the same time assuming the charter duties. We therefore find in the acts authorizing the lease, and in the terms of the lease and the essential character of the lessor corporation, enough to impose upon the defendant the obligation to pay the percentage claimed. When the defendant took the place of the lessor corporation it became obligated to take and retain 1 per cent. of the fares received by it to and for the use of the city, and to make payment thereof to the city. The order should be affirmed, with costs. All concur.

BALTIMORE UNION PASSENGER R. CO.

v.

CITY OF BALTIMORE.

(*Maryland Court of Appeals, December 17, 1889.*)

Taxation—Percentage upon Gross Receipts—Line Extending Beyond City Limits.—Where a portion of the line of a street railroad extends beyond the city limits, and the company has kept no account of the passengers travelling upon such portion, the gross earnings of the company within the city upon which the percentage payable to the city for the use of its streets in terms of the charter is chargeable, will be computed in the proportion

that the number of miles travelled by the cars inside of the city limits bears to the total mileage travelled by said cars.

Same—Evidence—Estimates by Passengers.—In an action by a city to enforce payment of a percentage of the earnings of a street railroad company whose road extends beyond the city limits, the testimony of passengers as to their estimate of the number of persons travelling upon the portion beyond the city limits is not admissible for the purpose of showing the proportion of receipts applicable to such portion of the road.

Same—Deduction from Gross Earnings—Compromise of Disputes.—When the ordinance granting a street railway company the privilege of using the city streets, provides that the percentage upon the gross earnings payable therefor shall be correspondingly reduced whenever the amount of the gross receipts of any other street railroad company shall be reduced, such company is not entitled to a reduction by the acceptance by the city from other companies of sums less than claimed by it by way of compromise of suits and controversies.

APPEAL from Circuit Court, Baltimore County.

John K. Cowen, E. F. D. Cross, Geo. D. Penniman, and John I. Yellott for appellant.

Bernard Carter, F. S. Hoblitzel and R. R. Boorman for appellee.

IRVING, J.—The appellee sued the appellant, in the superior court of Baltimore city, and the case was removed to Baltimore county for trial. The declaration sets up a claim for park tax from February 1, 1885, to March 15, 1887. The appellant was incorporated under the general railway law of the state, and was, by ordinance No. 150 of the ordinances of the city of Baltimore of 1880, (Rev. City Code 1885, p. 323,) authorized to construct certain street passenger railways in the streets of the city, subject to certain conditions, as follows, to wit: "To pay the city register, for the use of the park fund, quarterly, twelve per centum of the gross receipts accruing from passenger travel within the city limits, and for each car in daily use upon said railways a license tax of five dollars shall be paid yearly to the city comptroller." By the act of 1882, chap. 229, the legislature assumed control of the whole matter, fixed the fare at five cents for adults, and three cents for children, and reduced the park tax from 12 to 9 per centum of the gross receipts. The appellant had its railway lines, viz., the Huntington-Avenue line, Columbia-Avenue line, and the Pratt-Street line. The two last named were wholly within the city limits; but the first extended beyond the city limits for the distance of one-half mile, and this fact has given rise to this controversy. For this half mile of track, beyond the city limits, of the Huntington-Avenue line, the company deducted one-half the gross-receipts of the company from all their lines, and paid the city only the 9 per cent. tax on the other half of the receipts. To this claim on

Facts.

the part of the appellant of the right to deduct one-half of the whole receipts of the company from all their lines, because of this half mile of track of one of the lines which is outside the city limits, and to pay no more park tax than what the other half yields, the appellee objected, and brought this suit to recover such sum in addition as the law entitles the city to receive. The Huntington-Avenue line travels 2.69 miles, one-half mile thereof only being outside the city. The distance travelled by a car of Columbia-Avenue line is 3.58 miles, wholly within the city; and the Pratt-Street line, wholly in the city, travels 2.36 miles. The aggregate of car mileage is 8.63 miles; but as certain portions of the tracks are common to each, making allowance for the distance travelled on common tracks, the total of track mileage is only 7.08 miles. Inasmuch as one of these lines extends beyond the city, and into Baltimore county, the gross receipts from or on account of that portion of the track which is without the city limits ought not to pay any part of the 9 per centum tax which has been imposed for the privilege accorded by the city to the appellant of using its streets for railway purposes. But it is self-evident that an arbitrary deduction of one-half the gross receipts of all the lines of the appellant to represent the revenues derived from the one-half mile of track outside the city cannot be right. To deduct one-half of the gross earnings before computing the tax to be paid, as representing the revenues derived from that half mile outside the limits, which is only about one-sixteenth of the whole mileage of the appellant, is suggestive of such an enormous amount of work done and money earned by that portion of the road, as compared with the rest of the mileage within the city, as taxes credulity too heavily for acceptance as a fair basis of settlement with the city. Having accepted their privileges on the condition of paying this tax upon the gross receipts, it was the duty of the appellant to furnish an accurate statement of such receipts. Upon a bill for discovery in aid of this suit, the total gross receipts have been given, in response to the demand, as \$277,269; but that amount includes the receipts from the county part of the tracks, of which they say they have kept no account separate and apart from the other parts of their lines. In their answer to the bill for discovery, and by the testimony of their officers, it is shown that they thought it impracticable, by the methods and agencies used by the company, to keep a separate account of the fares received from that part of the road. Having no separate fare for the part of the road lying outside the city limits, but the five cents paid outside the city entitling the passenger to ride to any part of the city on that line, and, by a free transfer, to any

part of the city, traversed by any one of the lines of the appellant, and *vice versa* for persons getting on in the city and going to the county, it is clear that some method must be adopted to determine with reasonable accuracy what proportion of the revenues shall be deducted as not liable to tax. The evidence shows that a very small part of the fares received were paid for rides begun and ended on the county part of the track. The five cents paid, therefore, in very much the larger number of instances, represented rides wholly in the city, and those begun in the county and ended in the city, or in the city and ended in the county; and inasmuch as portions of the tracks in the city were travelled by each line of cars, and inasmuch as the system of transfers from one line to another prevailed by which passengers could start on one line and end their trip on another, it is plain that any method which might be adopted to ascertain a proper deduction from the total gross receipts to represent the earnings of that part of the Huntington-Avenue line which was outside the city limits must involve a calculation on the basis of the gross receipts from all the lines.

The first five exceptions relate to evidence offered on behalf of the appellant which was rejected. By that evidence it was sought to establish a proper basis of computation, on the ground that the larger part of the passengers on that line got on in the county, and rode into the city, or in the city and rode into the county, than began and ended their rides in the city. Witnesses who rode on that line twice or more a day stated their estimate from casual observation as to the proportion of passengers so doing. That the exclusion of such evidence was no ground of error is apparent from several considerations. If it was impracticable, as the company stated, to keep an accurate account by a record of the passengers riding on the road, when and where they entered, and where they alighted, it is perfectly clear that the testimony of passengers who only observed now and then, and who did not tell and could not tell at what point outside the city the passengers they observed got on, or where they got off in the city, or *vice versa*, could not supply a safe method of ascertaining what was wanted. It would not only be the merest guess, resulting from only occasional observation, but it gave no possible help towards determining what proportion of the journeys of these passengers was made on the tracks in the city and the track outside the city. Certainly, unless some method of reaching that proportion was supplied by proof in addition to the statements of those witnesses, their statements would not enable a jury to form a reasonably fair basis for the jury

Evidence as to
number of
passengers.

to determine what was the real earnings of Baltimore county track.

The sixth exception brings for review the action of the court on the prayers submitted by the respective parties, and as the second prayer on the part of the plaintiff was adopted by the court below, as supplying to the jury the true method of making the ascertainment of proper allowance for the receipts on account of the track outside of the city limits, we will consider that first. The evidence having supplied the means of determining with certainty how many miles each car of the company, or each line, traveled during the period involved in the suit, by proof of how many round trips each car on each line made during the period sued for, and that proof enabling the jury to find with accuracy how many miles were traveled by the cars of the company upon the half mile of track of the Huntington-Avenue line outside the city, and being given the total gross receipts of all the lines, the court gave the jury an instruction for an arithmetical proportion, by which the half-mile track's part of the gross receipts for fares was ascertainable. This instruction, in the absence of a better one, supplied by actual account of each fare paid in the county for a ride begun there and ended there, or begun there and ended in the city, and giving the distance traversed in the county and in the city, and *vice versa*, seems to us to reach the justice of this case, and to be free from objection. The rule, thus set up, is as follows: "The greatest sum to which the defendant is entitled, as a deduction from its total gross receipts from passenger travel during the period from February 1, 1885, to March 15, 1887, (the period embraced in this suit), in respect of its passenger travel outside the city limits, is that sum which bears the same proportion to said total gross receipts as the number of miles traveled by said cars outside the city limits bears to the total mileage traveled by said cars; and if the jury shall find that the total mileage traveled by the cars of the defendant on its said three lines from February 1, 1885, to March 15, 1887, was 1,954,156 miles, and that during the same period that portion of said total mileage of 1,954,156 miles which was traveled by the defendant's cars on that portion of their line which was outside the city limits was 126,781 miles, and that the total gross receipts of the said company, from passenger travel on all its said lines during said period was \$277,269, then the sum to be deducted from said total gross receipts in respect of its passenger travel outside of the city limits is to be ascertained as follows, that is to say: As 1,954,156; 126,781; \$277,269; \$17,985,—which said sum of \$17,985 is to be deducted from said sum of \$277-

Apportion-
ment of gross
receipts.

269, and upon the remainder, to-wit, the sum of \$259,284, the plaintiff is to recover 9 per cent., less such amount as the defendant has already paid to the plaintiff on account thereof for the period from February 1, 1885, to March 15, 1887, as shown by the witness Fender." It appears clear that the court thought that, as there was no evidence enabling it or the jury to find how far each passenger who rode on the cars traveled, the only way to approximate a fair basis of settlement was to act on the assumption that each part of each line carries as many as any other part. This seems reasonable, and is the principle the legislature has sanctioned as the mode of ascertaining the taxable gross receipts of steam railroads whose tracks are partly within and partly without the state of Maryland. 2 Code, art. 81, § 153, p. 1264, makes this provision: "Whenever the road of any railroad company, organized under the laws of this state, shall extend beyond the limits of this state, into any other state or states, and the return of the treasurer or other financial officer of said company, made to the comptroller, shall not show certainly and accurately the precise amount of gross receipts within this state, the comptroller may ascertain said amount by making the gross receipts in this state bear the same proportion to the whole gross receipts of said company as the number of miles of said road in this state does to the whole number of miles in the length of said road." In *State v. Railroad Co.*, 45 Md. 384, this court said that this rule is "fair and reasonable," and that "it is true the gross receipts on one part of the road may be greater than on another, but perfect equality in the assessment and apportionment of taxes is unattainable," and hence they adopted this rule as right. This court cites *Delaware Railroad Tax Case*, 18 Wall. (U. S.), 208-231, where this rule was approved by the supreme court of the United States. It was also approved in *State Railroad Tax Cases*, 92 U. S. 608-611, and *Western Union Telegraph Co.'s Case*, 125 U. S. 530-552.

There is one difference in the principle adopted in this case and that prescribed in the statute quoted and approved in the cases decided which ought to be noted, and which has already been alluded to. It is that this construction adopts the basis of the full mileage traversed by the cars of the appellant instead of the simple track mileage. The reason for this, and the justice of it, grows out of the fact that there is a portion of the track common to some of the lines, and as the cars pass over the tracks they are to be presumed to be earning fares by the carriage of passengers. Therefore the actual round trips made by each car represents its full earnings, and the exact distance also it has traversed, and therefore gives

a more accurate method of reaching the earnings of that part of the road which is not subjected to tax. Approving, as we do, the granting of the plaintiff's second prayer, it follows, as a consequence, that the defendant's first prayer was properly rejected. If any injustice is done the appellant, it results from its neglect to furnish a more accurate method of fixing the half mile track earnings.

The plaintiff's first prayer, and the second, third, and fourth prayers of the defendant, involve the construction of the ninth section of ordinance No. 150, which imposes the tax, and the admissibility of certain evidence of the appellant which by the first prayer of the appellee is asked to be stricken out, and which was by the court below stricken out. Section 9 of the ordinance No. 150 of 1880 (which granted appellant its privileges and imposed the tax sued for) provides "that whenever the amount of the gross receipts of any passenger railway company, owning or operating any railway tracks in the city of Baltimore, now required to be paid to the city register for the use of the park fund, shall be reduced from 12 per centum to any less amount, the said reduction shall apply to the railways hereby authorized to be constructed." The appellants offered evidence touching certain settlements of the city with some other railways with which the city was in controversy, in which the city submitted to certain deductions for the purpose of securing a settlement. The appellant claimed the benefit of like deductions, on the contention that it was a reduction of the per centum of tax, under the ninth section of the ordinance above quoted. It is unnecessary to elongate this opinion by the recital of what was done by the city in compromise of litigation with other companies; for it is very clear to us that such acts on the part of the city were not what the ninth section of ordinance No. 150 was providing for and guarantying to this appellant. The acceptance by the city of less than was due, for the purpose of ending suits and controversies over amounts claimed as due, by way of compromise, was certainly not a reduction of the per centum of tax, and was not what was intended by that clause of the ordinance. It only meant that if thereafter any other company should be granted privileges such as was accorded the plaintiff, and a less per centum of tax on the gross receipts of such company should be required of them than was required of appellant, or if the rate of per centum should be diminished from the tax on companies chartered before the appellant, then such diminution of rate should also inure to the benefit of the appellant. The city authorities might possibly have exceeded their authority, and made illegal settlements, but

**Deduction
from gross
receipts.**

it is not necessary for us to consider whether they did or not. The appellant is very clearly not entitled to abatement because of those arrangements by way of compromise. Without relying on this view wholly, the appellee contends that since the passage of the act of 1882, chap. 229, fixing the park tax at 9 per centum, that ordinance No. 150 of 1880 has become a nullity, because the city has no power to modify, reduce, or repeal the park tax. There is much force in this argument, but we are so clear, in the view we have already expressed, this contention of appellee need not be considered. A proper construction of the ordinance excludes the view urged upon us by appellant's counsel. Finding no error, the judgment must be affirmed.

PEOPLE

v.

CENTRAL PACIFIC R. CO.

(*California Supreme Court, March 8, 1890.*)

Taxation—Pleading—Form of Complaint—Conflicting Statutes.—Under the provisions of Cal. Pol. Code, §§ 4480 and 4481 that "the four codes shall be treated as if passed at the same moment of time," and that "if the provisions of any title conflict with or contravene with the provisions of another title, the provisions of each title must prevail as to all matters arising out of the subject matter of such title," an action for the collection of taxes is governed by Code Civ. Proc., § 421, which enacts that "the forms of pleadings in civil actions and the rules by which the sufficiency is to be determined are those described by this act," and which is part of the title, "Pleadings in Civil Actions" being the only title in the codes devoted specially to the subject, notwithstanding the fact that the political code under the title "Revenue" authorizes a special form of complaint in such cases.

Same—Pleading—Averment of Defendant's Corporate Existence.—An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation.

Same—Pleading—Averment that Defendant is Owner of Property.—A complaint in an action against a railroad company to enforce the payment of taxes which avers the fact of assessment of "the franchise, roadway, roadbed, rails, and rolling-stock of the defendant," is insufficient if it does not aver that the defendant is the owner of such or any property situate in the state and within the jurisdiction of the board making the assessment.

Same—Pleading—Authority to Make Assessment.—Such complaint is also defective if it contains an averment that the state board of equalization apportioned the assessment to different counties, but does not show the authority of the board to make such apportionment, or that any portion of the property was situate in any one of the counties.

Same—Pleading—Indebtedness for Taxes.—An averment of indebtedness for state taxes is insufficient if the complaint contains no averment that any taxes were levied or imposed upon the defendant or its property; or, if a levy was made, when, where, or by whom it was made, or whether the

taxes were based or levied upon the assessment so made, or the property so assessed, or that there were any taxes against the defendant delinquent or unpaid.

Same—Misjoinder of Causes of Action.—Where a complaint in the name of the state to recover taxes states in one count the state taxes payable to the plaintiff, and also the taxes payable to it and apportioned to different counties through which the defendant's road runs, there is a misjoinder of causes of action.

Same—Waiver of Informalities—Sufficiency of Allegations.—Notwithstanding the provisions of a statute that "no assessment, or act relating to assessment or collection of taxes, is illegal on account of informality, nor because the same was not completed within the time required by law," a complaint to enforce the payment of the taxes must allege that it is sufficient to make out a *prima facie* case of a valid tax and that it is delinquent, viz: the assessment of the tax upon property of the defendant, the general character of the property assessed, and that its *situs* is within the state, or the county where assessed.

Same—Waiver of Informalities in Assessment.—Such statute although waiving informality in matters of assessment does not waive informality in the levy of the tax.

Same—Special Form of Complaint—Constitutional Law.—The provisions of the California Political Code authorizing the use of a special form of complaint to enforce the payment of taxes on railroads situated in more than one county, is in violation of the constitutional prohibition against the passing of special laws "to regulate the practice of courts of justice" and is invalid, notwithstanding the fact that the Political Code in which it is inserted is a general law.

Same—Special Scheme for Collection—Constitutionality.—Under the provision of the California Constitution prohibiting the enactment of special laws for the collection of taxes, the scheme for the collection of taxes on railroads situated in two or more counties, provided by §§ 3665-3670, Pol. Code, which differs from that found in the general law, is unconstitutional and void.

Same—Powers of Legislature.—The enactment of the special provisions for the collection of such taxes is not authorized by the provisions of art. 13, Cal. Const., that the franchise, roadbed and property of railroads operated in more than one county shall be assessed by the state board of equalization, and that the legislature shall pass all laws necessary to carry out the provision of the article, the provision of that article being applicable only to assessments, and not to the levy or collection of the tax on the property when assessed, and conferring no power upon the legislature to pass special laws for those purposes.

BEATTY, C. J., and THORNTON, J., dissent.

APPEAL from Superior Court of the City and County of San Francisco. In bank.

George A. Johnson, Atty. Gen., and *D. M. Delmas* for the people.

Creed Haymond, *John Garber* and *H. S. Brown* for respondent.

FOX, J.—This is an action, brought in the name of the people of the state, to recover from the defendant a certain sum of money alleged to be due the state for taxes, and also various other sums of money alleged to be due to divers of the counties of the state, for taxes for the year

Case stated.

1886. The defendant demurred to the complaint, which demurrer was, upon argument, sustained by the court below, and judgment entered for the defendant, from which the plaintiff appeals. So far as we are advised, this is the first case in which the precise questions here involved, under the present constitution, has been presented for adjudication. To a complete understanding of it, we give the pleadings at some length. The complaint, after giving the title of the court and cause, is as follows: "Plaintiff avers that on the 14th day of August, in the year 1886, the state board of equalization assessed the franchise, roadway, roadbed, and rolling-stock of the defendant at the sum of \$20,000,000. That the board apportioned the said assessment as follows: To the county of Alameda, the sum of \$2,607,230, [and here follows similar language as to 16 other counties, differing only in amount.] That the defendant is indebted to plaintiff, for state and county taxes for the year 1886, in the following sums: For state taxes, in the sum of \$112,000; for county taxes of the county of Alameda, in the sum of \$16,225.34, [and here follows a statement in similar form as to the other 16 counties before named, differing only as to amount,] with 5 per cent. added to each of said several sums for non-payment of taxes. Plaintiff demands judgment for said several sums, with 5 per cent added thereto, together with costs and counsel fees as allowed by law, and prays that an attachment may issue in form as prescribed by section 540 of the Code of Civil Procedure." To this complaint the defendant demurred on the following grounds: "*First*. That the court has no jurisdiction of the subject-matter of the action, nor the person of the defendant herein. *Second*. That the plaintiff has not the legal capacity to sue herein, for the following reasons: That sections 3668-3670 of the Political Code, under the provisions of which said action was instituted, are unconstitutional and void, in this: that said sections are in contravention of subdivisions 3 and 10 of section 25 of article 4 of the constitution of the state of California. They also are in contravention of section 21 of article 1 of the constitution of the state of California, and of section 1 of article 12 of the constitution of the state of California. That said sections of the Political Code are in contravention of section 1 of the fourteenth amendment of the constitution of the United States. That, so far as the assessment of railroad property is concerned, sections 4 and 10 of article 13 of the state constitution, upon which the said action is founded, are in contravention of section 1 of the fourteenth amendment of the constitution of the United States. *Third*. That several causes of action have been improperly united. *Fourth*, That several

causes of action have been improperly united, which are not separately stated in the complaint; that is to say: (1) a cause of action for state taxes; (2) a cause of action for county taxes of the county of Alameda. [Followed by a separate subdivision, in similar form, for each of the other 16 counties.] *Fifth.* That the complaint does not state facts sufficient to constitute a cause of action. *Sixth.* That the complaint is ambiguous, unintelligible, and uncertain, in this: that it does not appear how or when defendant became indebted for taxes; that it does not appear how or when 5 per cent. was added. Wherefore, defendant prays judgment against plaintiff, and that it may have its costs in this behalf extended."

It will be unnecessary to consider these grounds of demurrer separately, at any considerable length. The questions of jurisdiction, of misjoinder of causes of action, of insufficiency of facts, and of ambiguity, all turn upon the constitutionality of the provisions of the Political Code under which the plaintiff is attempting to proceed, and under which alone, if anywhere, this form of complaint can be justified. But, tested by the provisions of the Code of Civil Procedure, every point made against the complaint is well taken. Outside the Political Code of this state, it is doubtful if either authority or precedent can be found which would have induced any lawyer to file in a court of justice a complaint like this. It does not contain "a statement of the facts constituting the cause of action," as required by section 426 Code Civil Proc., or as required by any other rule of pleading known to the profession. And yet, by section 421 of the same Code,—the general statute of this state devoted specially to the subject of pleadings and procedure in civil actions,—it is expressly provided that "the forms of pleading in civil actions, and the rules by which the sufficiency of the pleading is to be determined, are those prescribed by this code." And by the provisions of the Political Code, from which Code it is conceded that this form of complaint is taken, it is expressly declared that "the provisions of the four Codes shall be treated as if passed at the same moment of time, and were parts of the same act," and that, "if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." Pol. Code §§ 4480, 4481. The sections of the Code of Civil Procedure referred to are part of title 6, pt. 2. The "subject-matter" of that title is "Pleadings in Civil Actions," and it is the only title in the four Codes devoted specially to that subject. It is therefore, the title which

**Sufficiency of
complaint.**

**Form of com-
plaint is gov-
erned by Code
of Civil Pro-
cedure.**

section 4481 of the Political Code declares "must prevail as to all matters and questions arising out of that subject-matter." How, then, can we test the sufficiency of pleadings by the provisions of section 3670 of the Political Code? That section is the only warrant for this complaint, and is found in title 9, pt. 3,—a title devoted entirely to the subject of "Revenue." Responsive to this, the appellant says that the same legislature passed both codes; that its power to legislate is supreme, except when and where limited by the constitution; and that its power is ample to prescribe one form of complaint for one class of cases, and another form for another class. That is true; but the same legislature had the power to say, and did say, that "the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act," to-wit, the Code of Civil Procedure, which is a separate act from other Codes, though deemed to have been passed at the same moment of time, and, in the exercise of the same power, at the same moment of time, in another act, which defines the rights and duties of all persons subject to the jurisdiction of the state, and a part thereof devoted to a "definition of the sources of the law," and a title of such part defining "the effect of the Codes," it expressly tells the courts by what rule they shall be governed in case the provisions of the four Codes, or of either Code, are found to be conflicting.

Guided by that rule, when we examine this complaint we find it defective in all these particulars: (1) The defendant is sued by a name indicating that it is not a natural person, but a company of some kind, but there is no averment of the fact of incorporation, or of any fact to show that it is an artificial being capable of being sued; nor, if incorporated, is there any averment to show where, or under what law, so that the court may determine where jurisdiction of its person lies. An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation. *Loup v. Railroad Co.*, 63 Cal. 99. (2) There is an averment of the fact of assessment of the "franchise, roadway, roadbed, rails, and rolling stock of the defendant;" but there is no averment that the defendant is the owner of such or any property situate in this state or elsewhere—nothing to show that the property so assessed was or is within the jurisdiction of the board making the assessment, or of this court, nor, indeed, that there was any such property *in esse*." (3) There is an averment that the board apportioned the said assessment to 17 different counties in the state, but there is nothing to show its authority to

Averment of
defendant's
corporate
existence.

Ownership of
property
assessed.

make any such apportionment; that any portion of the property, or of any property of defendant, was situate in any one of said counties. The apportionment is of the total sum at which the assessment is made, without a word of description of the property so assessed, or of the part thereof so apportioned to any one of said counties. (4) There is an averment of indebtedness for state taxes, but no averment that any taxes were ever levied or imposed upon the defendant or its property; or, if a levy was made, when, where, or by whom it was made, or whether the taxes were based or levied upon the assessment so made, or the property so assessed as aforesaid, or that there are any state taxes against the defendant, delinquent or unpaid. (5) There is an averment of indebtedness for county taxes in each of the 17 counties named, but as to each the same defect exists as above noted in reference to state taxes. (6) If there is any cause of action stated in this complaint at all,

Apportionment of assessment to counties.

Averment of indebtedness for taxes.

Misjoinder of causes of action.

Ambiguity.

Waiver of informalities.

there are 18 separate and distinct causes of action, all in one count, and not separately stated. They affect—and if the money is collected it will belong to—18 different persons, to wit, the state and 17 separate counties. The only provision in the title of the Code on the subject of pleadings which authorizes the uniting of several causes of action in the same complaint requires that they shall all belong to one class, affect all the parties to the action, and must be separately stated. Code Civ. Proc. § 427. (7) The complaint is also ambiguous, for the reason stated in the sixth ground of demurrer. Tax proceedings are *in invitum*, and, to be valid, must be *stricti juris*. Cooley Tax'n, 259, 260; Moss v. Shear, 25 Cal. 46; People v. Mahoney, 55 Cal. 288; Lake County v. Mining Co., 66 Cal. 20, 4 Pac. Rep. 876. If not valid, they constitute no cause of action. It therefore becomes necessary that a complaint in an action for the collection of a tax should show upon its face facts sufficient to make out a *prima facie* case of valid tax and that it is delinquent. It is true that the title on "Revenue" provides that "no assessment, or act relating to assessment or collection of taxes, is illegal on account of informality, nor because the same was not completed within the time required by law." Pol. Code, § 3885. But the waiving of informality does not waive the necessity for action. That an assessment shall not be invalid because of some informality does not excuse the total want of assessment. There can be no assessment unless there is some property assessed; and, to be assessed, there must be some attempt at description of the property. At

least, its general character must be shown, and its *situs* must be shown to be within the state or the county where assessed. It will be observed, also, that the section quoted refers to informality in the matters of assessment and collection only. The statute nowhere waives informality in the matter of levy of the tax. There is no tax until one is levied, and a complaint shows no indebtedness for taxes unless it shows the levy of a tax. In this complaint there is no intimation that a tax, either state or county, was ever levied. Counsel for appellant has cited several decisions of this court in support of the power of the legislature to prescribe by special act a special form of complaint in actions for the collection of taxes. Unfortunately for his argument, those decisions were all based upon special acts, passed at a time when the legislature had power to pass special laws upon almost any subject, and even before the adoption of the Codes; forgetting that here he is attempting to proceed under the Codes themselves, and that in them the legislature has itself provided for just such a contingency as arises here, and directed us as to which shall prevail in case of conflict between the different parts of the same general law.

2. But the respondent, by its demurrer, attacks this complaint, and all the proceedings upon which it is based, upon other and higher ground than that which we have thus far considered. The law upon which these proceedings are based is attacked as being in conflict with the constitution of the state. The provisions of the constitution on the subject of revenue are all found in article 13, and comprise the whole law of the constitution on the subject of the assessment of property for purposes of taxation, and of the levy and collection of taxes. Those provisions which bear most directly upon the questions here involved are found in sections 10 and 13, which read as follows: "Sec. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value; and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts." "Sec. 13. The legislature shall pass all laws necessary to carry out the provisions of this article."

Constitutional provisions regulating railroad taxes.

The last section quoted is the one to which we have to look for authority to levy the tax. The first section of the article commences by providing that "all property in the state * * shall be taxed in proportion to its value, to be ascertained as provided by law," and several subsequent sections speak of the "levy" and the "taxes so levied," and one says that "income taxes may be assessed to and collected from," etc.; but nowhere in the article is there any provision made as to when, or by whom, or in what manner, any property tax shall be levied. Provision for that must be made by the legislature under section 13—the last section of the article. The same is true with reference to the provision for the collection of property taxes. Both these subjects are relegated entirely to the legislature. We are, therefore, compelled to turn to the article of the constitution on the subject of the "Legislative Department," to ascertain whether or not there are any limitations upon the mode and manner in which the legislature may exercise the powers and perform the duties imposed upon it by this section 13, or as to the extent to which it may go in the exercise of those powers. These provisions are found in article 4 of the constitution. Turning to section

25 of that article, we find this provision: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * *Third*, regulating the practice of courts of justice; * * * *tenth*, for the assessment or collection of taxes; * * * *thirteenth*, extending the time for the collection of taxes; * * * *twentieth*, exempting property from taxation; * * * *twenty-fourth*, authorizing the creation, extension, or impairing of liens.

An examination of the whole section shows conclusively that the intention of the framers of the constitution, and of the people in adopting it, was to prohibit the legislature from passing local or special laws which should in any wise affect questions of taxation, or the liens of taxes, or the practice in courts of justice. All these must be provided for by general and uniform law. The legislature has provided a general and uniform law "regulating the practice of courts of justice." That law requires that the complaint in a civil action shall be such as we have already indicated, and that its sufficiency shall be determined as therein prescribed. Yet, in the teeth of this constitutional inhibition, and in spite of the fact that the provisions of the constitution are "mandatory and prohibitory unless by express words they are declared to be otherwise," (article 1, § 22), the legislature has provided—*First*, a general scheme for the assessment, levy, and collection of taxes; and, *second*, a special scheme for the assess-

ment, levy, and collection of taxes on railroads situate in more than one county, and in that special scheme has provided for the form of complaint adopted in this action. The special scheme referred to is found in sections 3665 to 3670 of the Political Code, the form of complaint being authorized by the latter section. The whole scheme, so far as it relates to the collection of taxes, is claimed to be in conflict with the constitution, and in due course will be considered, but for the moment we are dealing only with that part of it which provides for this complaint.

It is claimed by appellant that this is not in conflict with the third subdivision of said section 25, of article 4, for that it relates to pleading and not to practice. But this is taking too narrow a view of the language of the constitution. It is evident that the words of this inhibitory clause of the constitution are used in their general sense, and in that sense the words "practice of courts of justice," include all "pleadings," although the word "pleadings" never includes all "practice." It is impossible to contemplate the subject of "practice of the courts of justice," and eliminate from the mind all thought of "pleading." Burrill defines "practice," first, as "the course of procedure in courts," and says that "in a general sense practice includes pleading." Rapalje's & Lawrence's Law Dictionary gives the following definition of the word "practice:" "The law of practice or procedure is that which regulates the formal steps in an action or other judicial proceeding. It therefore deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions."

Special laws
regulating
practice of
courts of law.

But it is further claimed by appellant that even if "practice" includes "pleadings," the provision is not in conflict with this inhibition of the constitution, for the reason that it is found in the Political Code, which is a general law. It does not follow that, because an isolated provision is found in a general statute, the provision is itself a general law. Such a provision may be purely "special," and come within the inhibition of the constitution, even when found in the Code itself. It was so held, with reference to a section of the Political Code, in *Earle v. Board*, 55 Cal. 489. In *Miller v. Kister*, 68 Cal. 142, 8 Pac. Rep. 813, it was held that a provision found in the general law, entitled "An act to establish a uniform system of county and township government," temporarily suspending the operation of some of the provisions of the act as to four of the counties of the state, was "special" legislation, and void under the clause of the constitution here under consideration. So it appears that a

clause or provision special in its character—applying to particular individuals, particular places, or particular cases—is none the less special because inserted in the most general of public acts. A special act cannot be converted into a general act by a declaration of the legislature that it shall be so considered." *San Francisco v. Water-Works*, 48 Cal. 493. Nor can it be so converted by being embodied or entombed in an act which in its general scope and purpose is a general law. If it can be so converted into a general law, then, as was said by the court in *Investment Co. v. School-Dist.*, 21 Fed. Rep. 151, "every prohibition * * * contained in the constitution may be violated with impunity. * * * An act cannot be both public and private; but it can be either and be special." In *Manning v. Klippel*, 9 Or. 367, it was held that an act providing for the compensation of the sheriffs and clerks of 14 out of 20 counties of the state was a "local law" for the assessment and collection of taxes for county purposes, and therefor within this constitutional prohibition, and void.

3. But the objection goes not alone to the form of complaint, but to the entire legislative scheme for the collection of taxes upon railroads operated in more than one county. It is to the effect that the entire scheme is special, and in conflict with the different subdivisions of section 25, art. 4, of the constitution, which we have quoted, and that being so in conflict, no action can be maintained thereunder for the collection of taxes, whatever may be the form of the complaint. If this scheme is special, then the cases which we have already cited will apply to it in all its parts, and to them many others might be added from the courts of last resort in very many of the different states in the Union; but this court has already expressed itself so plainly upon the subject in the cases cited that it is unnecessary to go elsewhere for authority. Practically admitting that the scheme is "special," the appellant justifies it under section 13 of article 13 of the constitution above quoted, claiming that the legislature is not only authorized, but required, to pass all laws necessary to carry that article into effect. That is true, but it is not authorized, required, or empowered to pass laws that are not necessary to carry it into effect, nor to destroy the uniform operations of laws which are required by the constitution itself to have a uniform operation. It will be borne in mind that the constitution provides for a difference in the mode of assessment only,—not in the mode of levy, or of collection of the tax on the property when assessed. Under the constitution, it became necessary, or if not necessary, at least

Special scheme
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valid.

proper, for the legislature to pass laws providing the details for the assessment and apportionment of the assessment of this class of property by the state board of equalization. It is the only property in the state of which that board is authorized by the constitution to make assessment; and, as the board is only authorized to make such assessments when the property is situate in two or more counties, apportionment thereof to the several counties became necessary. To provide for the details of that apportionment, and of notice to the several counties interested, it became necessary and proper that the legislature should act; and, in so far as its action relates to the assessment, and the apportionment thereof, it is not attacked as being in conflict with the constitution. But this legislation also provides a mode of collection differing from that found in the general law on the subject,—not necessary for the purpose of carrying into effect any of the provisions of article 13 of the constitution and special, because not applicable to all property, or even to railroad property, generally, but only to such railroad property as is situate or operated in two or more counties. For this reason, it is in direct conflict with, and is specially forbidden by, subdivision 10 of section 25 of article 4 of the constitution. It is therefore void, and furnishes no cause of action upon which suit can be maintained under it. The provisions of the Code for the collection of taxes generally, and those for the collection of taxes upon the portion of this class of property, especially which lies in two or more counties, are too long to justify quotation in full in this opinion: but a reference to a few of the points of difference between them will serve to illustrate the special character of the legislation against which this objection is pointed.

Before calling attention to those differences, however, it is proper to note a few general provisions of the revenue law which are alike applicable to all persons and all property, and which serve to show a total absence of necessity for any difference in the mode of collection. "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all the property of the delinquent. The judgment is not satisfied, nor the lien removed, until the taxes are paid, or the property sold for the payment thereof." Pol. Code § 3716. "Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock M. of the first Monday in March in each year." *Id.* § 3717. "Every tax due upon real property is a lien against the property assessed, and every tax upon improvements upon real estate assessed to others than the owner of the real

estate is a lien upon the land and improvements, which several liens attach as of the first Monday of March in each year." *Id.* § 3718. These provisions apply to, and these liens attach to, the property of railroad companies owning and operating roads situate in two or more counties, the same as to all other property in the state. It will thus be seen that for the taxes upon this class of property the state, and every county in it, has the same security that is provided for taxes upon all other property in the state,—a lien upon all the property of the owner,—not even excepting that which is by law exempt from execution, and by other provisions of the statute it is made a first lien. So that in no event can the state be defeated in the collection of taxes if its own proceedings in the assessments, levy, and collection have been lawful.

Under the general law, the taxes upon all property, except that here under consideration are collected by the tax collector of the county in which the property is situated. The state assumes the burden, the expense, and the risk of transporting its portion of the taxes so collected from the respective county-seats to the state treasury. Under this special law, all the taxes upon this class of property must be paid at the office of the state treasury, after first getting a certificate of the comptroller as to the amount thereof. This includes not only the state but the county taxes for the several counties; thus imposing upon the taxpayer the burden, the expense, and the risk of transporting to the capitol of the state moneys which, in the aggregate, may be estimated by tons, as all taxes in this state must be paid in coin. Under both laws, if the tax becomes delinquent, 5 per cent. is added. Under the general law, on or before the first Monday in February the tax collector publishes in his county a delinquent list, which notifies the taxpayer of the amount of his delinquency, and of the time when the lien will be enforced by the sale of his property. Until that time, he has the right to pay the tax, with the 5 per cent. for delinquency, and 50 cents for the cost of publication of each separate description of real property assessed to him, and upon each assessment of personal property. If he does not pay it, the least amount of his property which any bidder will take and pay the tax and percentage and costs will be sold; and he will thereafter have at least one year in which to redeem the same. Under this special law, no notice of delinquency is ever published, but, if the taxes remain unpaid until after the first Monday in February, the comptroller must then commence an action for the recovery of the taxes due the state, and the various counties and cities and counties of the state, together with the said 5 per cent. penalty for delinquency, and the costs of

suit; and it is specially provided that, whether the tax be then paid before or after judgment, the defendant shall also pay such counsel fees as the court may allow. It is further provided that in such action the unverified complaint, in the form used in this case, shall be sufficient, and that upon the filing of such complaint the clerk must issue the writ of attachment prayed for. It will thus be seen that under this law the taxpayer is not only burdened with heavy costs and expenses not provided for by the general law, but, in addition to that, and notwithstanding the fact that the state has, as in all other cases, a first lien upon everything which he owns, any particular portion of his property which the representatives of the state may see fit to direct is liable to be summarily seized upon attachment, and, if it be personal property, taken out of his possession, held pending the suit, and finally sold under judgment for what it will bring. If there then be a deficiency, the original first lien still remains upon all the balance of his property.

The inequalities, and the possibilities of injustice, under such a provision, are certainly very great. Take the case at bar. The total amount sued for in this case, exclusive of costs and counsel fees, is \$330,800.44. For this the state has a first lien upon the property, and most of it fixed property, assessed by itself at \$20,000,000. Notwithstanding that vast security, she asks for—and, having asked, must have it—an attachment, under which her officers may direct the sheriff to seize and take possession of all the rolling stock of the company, stopping its entire traffic, and holding it for months,—possibly years,—until the litigation is concluded. Such a provision is not only in conflict with subdivision 10, *supra*, but also with subdivision 3, *supra*; for the general law regulating the practice of courts of justice authorizes the writ of attachment only when the plaintiff, by affidavit, shows that the debt for the recovery of which the action is brought is not secured by any mortgage, lien, or pledge of real or personal property. We make no point of the want of undertaking for the writ, for the reason that the state is not, under the general law on that subject, required to give an undertaking in any action brought by it. Under the general law, the sale for taxes upon realty is of the realty, or some part thereof. Such a sale will also be for the taxes upon personal property, if assessed to the same person. Under such a sale, there is a year at least in which to redeem. Under this special law, if the proceeding goes to judgment and sale, the sale may be entirely of personal property, from which there is no redemption. If of realty, there is but six months in which to redeem.

These are but a few of the points of difference between the general and special provisions of this law, but they are sufficient to show a marked and broad discrimination against the owners of railroad property situate or operated in two or more counties of the state. It is a discrimination which is not made against, and does not apply to, railroad property, and the owners of railroad property generally, but only when the property is situate in two or more counties. It is a matter of common knowledge that there are numerous railroads in this state, each situate wholly within one county. To such this special mode of collection of taxes has no application. While it is true that a law which applies to all of a class in a state is held to be a general law (to which rule, however, this court has held that there are some exceptions, as in *ex parte Westerfield*, 55 Cal. 550), it is equally true that one which applies to only a part of a class is special, and, under a constitutional inhibition like ours, is void. The case of *Dundee, M. T. Invest. Co. v. School Dist.*, No. 1, 19 Fed. Rep. 359, is directly in point. The state of Oregon had a constitutional provision providing that the legislature should not pass "special or local" laws for the assessment and collection of taxes for state, county, township, or road purposes. An act was passed providing for the taxation of mortgages upon real property situate in no more than one county, in which it was provided that mortgages upon land situate in more than one county should be void. An attempt was made to enforce the collection of taxes upon mortgages upon land situate in no more than one county, by sale of the notes and mortgages, as provided might be done, under the act. The sale was enjoined, and the act declared void, because it provided for the taxation of mortgages upon lands situate in not more than one county, and not upon all mortgages. Judge DEADY, in discussing the question, said: "An act providing for the assessment of mortgages generally is, so far, a general act. It comprehends the *genus*. But an act providing for the assessment of all mortgages for sums exceeding \$500 or not payable within one year from the date of their execution, is special. It comprehends only as species of mortgages. So an act providing for the assessment of mortgages on woodlands, plowlands, or riverlands, is special; and, in my judgment, an act that taxes mortgages on land in no more than one county, to the exclusion of those on land in more than one, is in the same category. It does not comprehend the *genus* mortgages, but only the species,—one county mortgages." So, here, these provisions of law now under consideration do not comprehend the *genus* railroads, but only the species,—two county railroads.

The general law for the collection of taxes in this state provides for the bringing of suit in certain cases ; but this is not one of them, and is not brought in accordance with that general law. This is a fact which still further serves to mark the provisions under which this proceeding is had as special, and in violation of the prohibitions of the constitution. Section 3899 of the Political Code, a part of that general law, reads as follows: " The comptroller may, at any time after the delinquent list has been delivered to a collector, direct such collector not to proceed in the collection of any tax on said list, amounting to \$300, further than to offer for sale but once any property upon which such tax is a lien. Upon such direction, the collector, after offering the property for sale once, and there being no purchaser in good faith, must make out and deliver to the comptroller a certified copy of the entries upon the delinquent list relative to such tax ; and the tax collector—or the comptroller, in case the tax collector refuses or neglects, for fifteen days after being directed to bring suit for collection by the comptroller—may proceed, by civil action, in the proper court, and in the name of the people of the state of California, to collect such tax and costs." This is the provision under which taxpayers other than those owning railroads situate or operated in two or more counties may be sued for the collection of taxes. The proceedings and form of complaint are then similar to those in this case, and are open to the same objection, when tested by the Codes, or by subdivision 3, § 25, art. 4, of the constitution, as already noted, but the action cannot be brought or maintained until the property has been offered for sale by the tax collector once, at least ; and even then it must be commenced in the county where the property is situate, and the money, when paid,—whether before or after judgment,—must be paid to the county treasurer, and not to the state treasurer. *Id.* § 3900.

The appellant argues that all these special provisions now under consideration operate as and constitute an immunity in favor of the respondent, and that it cannot, therefore, complain of them. If appellant is correct in this, then these provisions are in direct conflict with section 21, art. 1, of the constitution, and void. That section reads: " No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature ; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." But appellant is mistaken as to the party to whom these special privileges and immunities are granted. It is not to the few whose railroads are situate in two or

more counties, but to those whose railroads are situate each entirely in one county, and to all other taxpayers except those of the class to which this defendant belongs. As to this defendant, and the few others situate like it, these provisions impose burdens not imposed upon other railroad corporations. All railroad corporations in this state are organized under one general law, and the constitutional provision with reference to that law is: "Corporations may be formed under general laws, but shall not be created by special act." Article 12, § 1. This court has held, in the most emphatic terms, that any attempt to confer a benefit or impose a duty upon one or more corporations formed under a general law, not conferred or imposed upon all corporations formed under the same law, is in conflict with this provision of the constitution, and void. "Private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights, and be subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all. * * * The rights and duties of all corporations formed under the general law. * * * are fixed and determined by its terms, and can only be changed or modified by amendment of the general law; and every such amendment must be made applicable to all corporations created under the general law." *San Francisco v. Spring Val. Waterworks*, 48 Cal. 493. The same doctrine has since been laid down and adhered to in *Waterloo T. R. Co. v. Cole*, 51 Cal. 381; *Spring Val. Waterworks v. Bryant*, 52 Cal. 132; and *Omnibus R. Co. v. Baldwin*, 57 Cal. 160, 1 Am. & Eng. R. Cas. 316. That these provisions for the collection of taxes upon the property of railroad companies operating in two or more counties do impose burdens not imposed upon other railroad companies organized under the same general law, seems to us too plain for argument. From what we have already said, it follows that the judgment appealed from in this case must be affirmed. It therefore becomes unnecessary to consider the only other point made upon the demurrer. Our decision of that point either way would not change the result. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: THORNTON, J.

BEATTY, C. J.—I dissent. The prevailing opinion goes entirely upon the ground that the provisions of the Political Code relating to the assessment and collection of taxes levied upon railroads operated in two or more counties are in conflict with section 25 of article 4 of the state constitution,—a

section which prohibits local and special legislation on certain enumerated subjects. In my opinion, the legislation referred to is neither local nor special. It is not local, because it operates throughout the state, and it is not special, because it applies to all railroads of a class created and defined by the constitution itself. I content myself with this brief indication of the grounds of my dissent because want of time precludes a more elaborate statement. The question as to the alleged conflict of our revenue law with the fourteenth amendment to the constitution of the United States not having been considered in the opinion of the court, the occasion does not call for any expression of my individual views.

WISCONSIN CENTRAL R. CO.

v.

PRICE COUNTY.

(133 U. S. 496.)

Land Grants—Indemnity Lands—Sales and Homestead Rights Made and Acquired Previous to Date of Grant.—Under the act of Congress of May 5, 1864, granting to the state of Wisconsin certain public lands to aid in the construction of a railroad, and the provision therein that "in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections, or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same," indemnity lands within a prescribed limit may be selected by the railroad company, the provision authorizing the selection of indemnity lands is intended to make good not only losses by reason of sales made and homestead and pre-emption rights granted after the date of the grant and before the location of the road, but also by such sales and rights as were made and granted previous to the date of the grant.

Same—Taxation—Indefeasible Right—Refusal to Issue Patent.—When by Act of Congress lands are granted *in presenti* to a state in aid of the construction of a railroad, and it is provided that upon the completion of sections of 20 miles, patents shall issue for such portions of the lands granted as shall have been earned, an indefeasible right vests in the railroad upon the completion of its road, and the land is subject to taxation, although the land department has erroneously refused to issue patents therefor.

Same—Taxation—Approval of Selection of Indemnity Lands.—When a statute granting lands to a railroad provides that indemnity lands may be selected within prescribed limits, and that upon the approval of such selection by the secretary of the interior patents shall be issued therefor, the act of the secretary approving of the selection is judicial, and not ministerial, and until such approval has been made, the company has no such vested interest in the lands as subjects it to liability for state taxes in respect thereof. The failure of the secretary of the interior to reject the selection made by the company does not amount to a constructive approval.

ERROR to the Supreme Court of the State of Wisconsin.

In April, 1884, the plaintiff in this suit, the Wisconsin Central Railroad Company, a corporation created under the laws of Wisconsin, was the owner of certain lands situated in the town of Worcester, in the county of Price, in that state, and had a patent for them from the state bearing date on the 25th of February, 1884, upon which taxes had in the year 1883, been assessed by that county, although, as claimed by the plaintiff, the title to a part of these lands was at that time in the United States, and to the remainder of them in the state of Wisconsin. Upon a claim that the lands were thus exempt from taxation, the plaintiff, in April, 1884, brought the present suit in a circuit court of the state, to obtain its judgment that the state taxes were illegal, and to enjoin proceedings for their enforcement. The facts out of which this claim that the lands were exempt from taxation arose are briefly these :

On the 5th of May, 1864, congress passed an act making a grant of lands to the state of Wisconsin to aid in the construction of three distinct lines of railway between certain designated points. 13 St. 66. One of these lines is now held by the plaintiff. The grant in aid of it is in the third section of the act, the language of which is as follows: " That there be and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said state may determine, in a northwestern direction, to Bayfield, and thence to Superior, on Lake Superior, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, that it shall be lawful for any agent or agents of said state, appointed by the governor thereof, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tier of sections, above specified, as much public land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which the right of pre-emption or homestead has attached as aforesaid, together with sections and parts of sections desig-

nated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state, or by the company to which she may transfer the same, for the use and purpose aforesaid: provided, that the lands to be so located shall in no case be further than twenty miles from the line of said road." The seventh section enacted "that whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: provided, however, that no patents shall issue for any of said lands unless there shall be presented to the secretary of the interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the state of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin, and where the same end; which oath shall be taken before a judge of a court of record of the United States." The ninth section declared "that if said road mentioned in the third section aforesaid is not completed within ten years from the time of the passage of this act, as provided herein, no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States." By the act of congress of April 9, 1874, the time for the completion of the road and for the reversion of the lands was extended to December 31, 1876. 18 St. p. 28, chap. 82.

All the lands embraced by section 3 of the act of 1864, were granted in 1866, by the state of Wisconsin, to the Portage & Lake Superior Railroad Company, and to the Winnebago & Superior Railroad Company, respectively, companies which had been incorporated under the laws of that state. P. & L. Laws Wis. 1866, chap. 314, § 8; chapter 362, § 9. In 1869 the consolidation of these two companies, under the name of the "Portage, Winnebago & Superior Railroad Company" was authorized by the state, and in 1871 the name of the consolidated company was changed to the "Wisconsin Central Railroad Company," the plaintiff in this suit. The Portage, Winnebago & Superior Railroad Company duly filed the location

of its road from Stevens' Point to Bayfield on October 7, 1869; and in December following the commissioner of the general land-office withdrew from sale, pre-emption, and homestead entry the odd numbered sections of land within the 20 miles limit along the line of the location. The road was built in sections of 20 miles each. Section 6 and portions of section 5 and 7 fell within Price county. Section 5 was completed in February, 1874, section 6 in December, 1876, and section 7 in June, 1877. The whole number of acres in the odd numbered sections along the line of the railroad within the 10 mile limits was 1,377,383.93. Of this number, 789,622 acres had been disposed of by the United States before the act of May 5, 1864, was passed, and 161,659.53 were disposed of after its passage, and before the line of the road was located in October, 1869.

The plaintiff, the Wisconsin Central Railroad Company, received from the United States, prior to November 16, 1877, patents for the 240,363.54 acres within the place limits, that is, within ten miles on either side of the line of the road as located; and patents for 203,459.62 acres within the indemnity limits, that is, between ten and twenty miles of the line of the road. On January 9, 1878, the company received from the United States a patent for 162,622.89 acres, and on August 10, 1878, a patent for 29,398.51 acres; both of these patents covering land within the place limits. No other patents were issued by the United States to the company previous to the commencement of this suit, and the patents issued did not include the land upon which the taxes were assessed, to restrain the collection of which the suit is brought. Of the lands in question, eleven parcels, of forty acres each, lay within the place limits. The remainder of the lands lay within the indemnity limits. A list of selections of lands within the place limits claimed by the company on account of the sixth section of the road from Stevens' Point to Bayfield was filed in the local land-office on December 5, 1876. They included, among other lands, the 11 40's mentioned. A list of selections of land within the indemnity limits claimed by the company, on account of the same section of railway, was filed in that office on the 9th and 15th of December, 1876. They included the remainder of the lands referred to in the complaint. Repeated demands were made by the railroad company, from the time these lists were filed until after the trial of this cause, for patents covering the lands referred to, but no patents were granted for any of them. A full statement of the efforts to secure patents is given in the testimony of the vice-president and general legal manager of the company.

It appears from this statement, the accuracy of which is

not questioned in any particular, that up to the time of the decision of this court in *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, which was rendered in April, 1876, it had been the practice of the land department to allow grantees by the United States of land to aid in the construction of railroads, whose grants were similar in their terms to the one under consideration here, to take land from the indemnity limits in lieu of lands sold or otherwise disposed of by the United States prior to the passage of the act, and of lands to which a pre-emption or homestead right had previously attached; but that this practice was subsequently changed in consequence of the language of the court in that case, and its supposed decision that indemnity could be allowed only for such lands as were sold or reserved or otherwise disposed of, or to which the right of pre-emption or homestead had attached, between the passage of the act and the time the line or route of the road was definitely fixed.

The commissioner of the general land-office, in a letter addressed to the secretary of the interior under date of November 16, 1877, contained in the record, stated that this practice had existed since the inauguration of the railroad land-grant system, but that it would appear from the decision in question that the practice was erroneous; that indemnity could only be allowed for lands sold or disposed of after the passage of the granting act; and, applying that rule to the grant under consideration, the company had received patents for 41,820.09 acres in excess of the indemnity authorized. The secretary of the interior, in answer to this letter, under date of December 26, 1877, referred to the decision of the supreme court, and held, in pursuance of it, that lands sold or disposed of by the United States prior to the passage of the act granting lands to the state of Wisconsin were excepted from the operation of the grant, and that indemnity could not be obtained for the lands thus lost; citing from the opinion of the court to show that such was its decision. The secretary concluded by stating that, in accordance with that rule, the company had already received 41,820.09 acres in excess of what it was entitled to, and instructed the commissioner to call upon the company to relinquish its claim to that quantity of land, in order that it might be restored to the public domain. Repeated efforts were afterwards made by the agents of the company to induce the secretary of the interior to change his views upon that point, but without success. Accordingly no selections of indemnity lands for lands lost from the grant within the place limits along the line of the constructed road known as "section 6" were ever approved by him, and no patents of the United States were issued for such lands, or

for any lands within the place limits along that section, until after this suit was commenced. Having failed to secure any patent from the United States, the plaintiff made application in February, 1884, to the state of Wisconsin for a patent, and on the 25th of that month a patent by the state was issued to it, embracing the lands mentioned in the complaint. When application was thus made to the officials of the state, a careful examination was had by them of the selections, in order to determine whether any of the parcels were swamp lands.

There was no controversy concerning the facts of the case, and the trial court found substantially as follows: (1) That the lands described in the complaint were all wild, unoccupied, and unimproved, and situated in the town of Worcester, in the county of Price, and were a portion of the lands granted to the state by the third section of the act of congress of May 5, 1864, for the purpose of constructing what is now the plaintiff's railroad. (2) That 11 40's of the land described were situated within the ten mile limits of said grant, and all the rest within the indemnity limits, and all in odd-numbered sections. (3) That all of said lands were assessed in that town in 1883, and put on the tax-roll, and the amount of tax carried out against each respective piece, but were not assessed to the plaintiff by name, or to any one else, or to "unknown owners," and that none of the real estate included in the assessment-roll for that year was assessed to the owners thereof; that a warrant was attached to said tax-roll, and the roll, with said warrant attached, placed in the hands of the town treasurer for collection; that the taxes were unpaid thereon, and the town treasurer returned the same to the county treasurer as delinquent. (4) That on the 25th of February, 1884, the plaintiff received a patent from the state for all said lands, and thereby acquired the absolute title in fee to the same; that until then the plaintiff could get no title to the lands, and had no right to sell or convey the same; that until they were segregated and identified, and the grant applied thereto, the grant was "a float." (5) That the plaintiff's right to the lands was in dispute between the state and the United States; that said lands and others were withheld from the state and the plaintiff by the secretary of the interior, and thereby the issue of patents therefor by the United States was delayed; that the plaintiff did not in any manner cause the delay, but, on the contrary, was diligent and persistent in its efforts to procure the patents; that the delay in their issue was caused entirely by the government of the United States and the general land-office, against the protest of both the plaintiff and the state, and in spite of continued and unintermitted efforts made by both to obtain their issue by the

interior department. (6) That the lands described had at the time the taxes were levied and assessed thereon, in 1883, been selected as lands to which said land grant applied, but said selections had not been approved by the secretary of the interior, and had not been certified to the state, or in any manner identified as lands for which the plaintiff would eventually receive patents, but, on the contrary, the secretary of the interior refused to recognize the right of the state to the lands, or to approve the selections made.

As conclusions of law, the court found, in effect. (1) That it was not the intent and meaning of the act of congress that said lands should be subject to taxation until they had been earned by the plaintiff and patented by the United States; that while they had been in truth earned by the plaintiff before they were assessed for taxation, yet the plaintiff's right to the same, and to patents therefor, had been denied by the secretary of the interior; that the plaintiff could not exercise control over them until it should be determined whether it was entitled to receive patents for them as part of the lands granted. (2) That the lands were "a float" as long as the plaintiff's right thereto was not admitted and recognized by the secretary of the interior, but denied and disputed by him, and patents therefor withheld by him against the will and request of the plaintiff, and hence during such time the lands were not subject to taxation by the state. (3) That said lands were not subject to taxation in 1883, and that the taxes levied and assessed thereon for that year were illegal and void, for the reason that said lands were then exempt from taxation. (4) That said tax was a cloud upon the plaintiff's title to said lands, and it was therefore entitled to the relief prayed for in the complaint.

Upon these findings, judgment in favor of the plaintiff, perpetually restraining the defendants from collecting said taxes, was entered. The defendants appealed to the supreme court of the state, by which the judgment below was reversed, and the cause remanded to the circuit court, with directions to dismiss the complaint. To review this latter judgment, the cause is brought to this court on writ of error.

Edwin H. Abbot and Louis D. Brandies for plaintiff in error.

Willis Hand, M. Barry and J. C. Spooner for defendants in error.

FIELD, J.—It is familiar law that a state has no power to tax the property of the United States within its limits. This exemption of their property from state taxation—and by state taxation we mean any taxation by authority of the state, whether it be strictly for state purposes or for mere local and

special objects—is founded upon that principle which inheres in every dependent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the state, the object and extent of the taxation would be subject to the state's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The constitution vests in congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. *Van Brocklin v. State*, 117 U. S. 151, 168, 12 Am. & Eng. Corp. Cas. 578. This doctrine of exemption from taxation of the property of the United States, so far as lands are concerned, is in express terms affirmed in the constitution of Wisconsin, which ordains that the state "shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in such soil to *bona fide* purchasers thereof, and no tax shall be imposed on land the property of the United States." Const. 1848, art. 2, § 2.

It follows that all the public domain of the United States within the state of Wisconsin was in 1883 exempt from state taxation. Usually the possession of the legal title by the government determines both the fact and the right of ownership. There is, however, an exception to this doctrine with respect to the public domain, which is as well settled as the doctrine itself; and that is, that where congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property,—in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property,—then the donee or purchaser

Taxation of
property of
United States.

Acquisition of
indefeasible
right to pub-
lic domain.

will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation. Thus in *Carroll v. Safford*, 3 How. 441, 460, the complainant had entered certain lands belonging to the United States, in the local land-office, paid for them the required price, and received from the office a land certificate. Patents were issued for them, but, before their issue, the lands were assessed for taxation and sold for the taxes. The question whether they were subject to taxation by the state after their entry, and before the patents were issued, was answered in the affirmative. Said the court: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent." And again: "It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators." And again: "Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent certificate. Can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust." In *Witherspoon v. Duncan*, 4 Wall. (U. S.), 210, 218, a similar question arose, and was in like manner answered. Said the court: "In no just sense can lands be said to be public lands after they have been entered at the land-office, and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act." And again: "The contract of purchase is complete when the certificate of entry

is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title." See, also, *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.), 603, 608; *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.), 444, 461.

In the light of these decisions, it will be necessary, in order to determine the liability of the property held by the plaintiff to taxation in 1883, to consider the nature and extent of its interest in the property at that time acquired under the grant of congress of May, 1864, and by its subsequent construction of the road. Numerous grants of land were made by congress between 1860 and 1880, to aid in the construction of railroads—some directly to incorporated companies, others to different states; the lands to be by them transferred to companies by whom the construction of the roads might be undertaken. The different acts making these grants were similar in their general provisions, and so many of them have been, at different times, before this court for consideration that little can be said of their purport and meaning, the title they transfer, and the conditions upon which the lands could be used and disposed of, which has not already and repeatedly been said in its decisions. Each grant gave a specified quantity of lands, designated by sections along the route of the proposed road, with the exception of such as might, when the line of the road should be definitely fixed, have been disposed of or reserved by the government, or to which a pre-emption or homestead right might then have attached. For these excepted sections, which otherwise would have been taken from those designated along the line of the road, other lands beyond those sections within a specified distance were allowed to be selected. The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant. It was the practice of the land department, as shown by the evidence in this record, up to the decision of *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733 (in April, 1876), to allow deficiencies in the quantity of land intended to be granted, arising from sales or other disposition made before the date of the grant, as well as those made subsequently, and those arising from the attachment of pre-emption or homestead rights, to be supplied from lands

Nature and
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lying beyond the original sections, within what were termed the "indemnity limits." This practice was held in *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 625, 26 Am. & Eng. R. Cas. 513, to have been correct. As the court there said: "The policy of the government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways. The acts of congress, in effect, said: 'We give to the state certain lands to aid in the construction of railways lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them, or they may not be disposed of or such rights may not have attached when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of, or rights of settlers have attached to them, other equivalent lands may be selected in their place, within certain prescribed limits.' The encouragement to settlement by aid for the construction of railways was not intended to interfere with the policy of encouraging such settlement by sales of the land, or the grant of pre-emption rights." The court accordingly held that the indemnity clause covered losses from the grant by reason of sales and the attachment of pre-emption rights previous to the date of the act, as well as by reason of sales and the attachment of pre-emption rights between that date and the final determination of the route of the road.

After the decision of the court in the *Leavenworth Case*, the land department changed its practice, and refused to allow the deficiencies, arising from sales or other disposition made, or from the attachment of pre-emption or homestead rights before the date of the act to be made up from selections within the indemnity limits. But that decision did not warrant the change. The question in that case was not, for what deficiencies indemnity could be had, but what lands could be taken for deficiencies which existed? If what was then said indicated that deficiencies which could be supplied were limited to such as might arise after the passage of the act, it was a mere *dictum*, not essential to the decision, and therefore not authoritative and binding. The refusal of the land department, therefore, to allow the deficiencies arising in the sections within the place limits in this case to be supplied by selections from the indemnity lands, and to issue patents of the United States for them, was erroneous.

The question now arises as to how far this refusal affected the legal or equitable title of the company to the lands taxed

in 1883, for which it only obtained a patent in 1884. The lands taxed amounted to 11 parcels of 40 acres each, lying within the original sections named in the grant—that is, within the 10 miles limit from the line of the road—and the remainder were within the indemnity limits. Neither were allowed, because, by excluding the deficiencies arising before the date of the grant from indemnity, the whole amount of the lands granted had already been patented. So far as the 11 parcels of 40 acres each are concerned, the right of the plaintiff to them, and to a patent for them, had, as early as 1877, become complete under the terms of the granting act. The line of the railroad had been definitely fixed on the 7th of October, 1869; and the 3 20-mile sections, Nos. 5, 6, and 7, were all completed in June, 1877, and supplied with the buildings and appurtenances specified in the act to entitle the company to a patent for them from the United States. The title conferred by the grant was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, a float. But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims. *Schulenberg v. Harriman*, 21 Wall. 44, 60; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733, 741; *Missouri, etc., R. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491, 496; *Railway Co. v. Baldwin*, 103 U. S. 426, 429. The road having been built as early as June, 1887, and supplied, as required, with the appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then, to the 11 40-acre parcels which were capable of identification, an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the railroad company, with the consent of the government. They would have been in these respects deeds of further assurance

Effect of refusal of land department to allow for deficiencies.

of the patentee's title, and therefore a source of quiet and peace to it in its possessions.

There are many instances in the reports where such effect as is here stated has been given to patents authorized or directed to be issued to parties, notwithstanding they had previously received a legislative grant of the premises, or their title had been already confirmed. In *Langdeau v. Hanes*, 21 Wall. (U. S.), 521, 529, we have one of that kind. There this court said: "In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but, where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights, because it also embodies words of release or transfer from the government." We are of opinion, therefore, that these 11 40-acre parcels were in 1883 subject to taxation by the state of Wisconsin. The lands had become the property of the railroad company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the company then had a legal and indefeasible title to the lands, or merely an equitable title to them, to be subsequently perfected by patents from the government.

But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the state appointed by the governor, but until such selections were approved by the secretary of the interior. The agent of the state made the selections, and they had been properly authenticated and forwarded to the secretary of the interior. But that officer never approved of them. Nor can such approval be inferred from his not formerly rejecting them. He refused, as already stated, to issue to the company any patents for any more lands, insisting that it had already received over 40,000 acres too much, and he directed the commissioner of the general land-office to require the company to restore this excess to the government. The approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial, but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and,

Approval of
selection of
indemnity
lands.

in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And, in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what portion still remained. This action of the secretary was required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

The doctrine that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court. Thus in *Ryan v. Central Pac. R. Co.*, 99 U. S., 382, 386, in considering a grant of land by congress, in aid of the construction of a railroad, similar in its general features to the one in this case, the court said: "Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed." And again, speaking of a deficiency in the land granted, it said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose." The selection had been approved by the secretary. In *St. Paul R. Co. v. Winona R. Co.*, 112 U. S. 720, 731, the court, speaking of a previous decision, said: "The reason of this is that, as no vested right can attach to the lands in place (the odd-num-

bered sections within six miles of each side of the road) until these sections are ascertained and identified by a legal location of the line of the road, so, in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits, have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss." In *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406, 408, 24 Am. & Eng. R. Cas. 100, where the railroad grant as to indemnity lands was substantially similar to the one in this case, and one of the questions was as to the title to the indemnity lands, the court said: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the secretary of the interior." In *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 232, 26 Am. & Eng. R. Cas. 513, the court said: "In the construction of land-grant acts in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the land department, as of the date of the act of congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection." The same view has been held by different attorney generals of the United States, in their official communications to heads of the departments, where selections of the public lands have been granted, subject to the approval of the secretary of the interior, (Cape Mendocino Light-House Site, 14 Ops. Atty. Gen. 50; Portage Land Grant, *Id.* 645,) and such has been the consistent practice of the land department. The uniform language is that no title to indemnity lands becomes vested in any company or in the state until the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the secretary of the interior. It follows from these views that the indemnity lands described in the complaint were not subject to taxation as the property of the railroad company in 1883. The judgment of the supreme court of Wisconsin must therefore be reversed, and the cause remanded, with directions to enter a decree perpetually enjoining the collection of the taxes levied in the year 1883 upon the indemnity lands, and dismissing the complaint as to the 11 parcels, of 40 acres each. And it is so ordered.

Taxation—Grantees of "Railroad Land-Grant Lands" Reserved for Payment of Claims.—The "railroad land-grant lands" reserved and retained by the state of Minnesota for the payment of claims incurred in the construction of certain lines of railroad, and subsequently sold by it pursuant to the provisions of § 9, chap. 201, Minn. Sp. Laws, 1877, are subject to taxation in the hands of the grantees of the state, and no one but the United States can raise the question of the authority of the state to dispose of these lands for the purpose expressed in the acts referred to. A railroad company which has acquired title to the land through conveyances by the purchasers from the state cannot raise the question. *Morrison County v. St. Paul & N. P. R. Co.*, Minn. Sup. Ct., Feb. 7, 1890. MITCHELL, J., said:—"The lands in question were a part of the 'railroad land-grant lands' which were reserved and retained by the state by § 9, chap. 201, Sp. Laws 1877, for the payment of claims incurred in the construction of the lines from Watab to Brainerd and from Crookston to St. Vincent. See *Western R. Co. v. De Graff*, 27 Minn. 1. In pursuance of the provisions of this act, the lands were sold and conveyed by the state to Benjamin B. Eaton, and by Eaton to A. A. De Graff, and by De Graff to St. Paul & Northern Pacific Railway Company, which now claims that the lands are exempt from taxation. It is difficult to see on what possible ground such a claim can be seriously urged. The state in selling these lands certainly never contracted that they should be exempt from taxation in the hands of the grantees. They were undoubtedly taxable in the hands of Eaton, the immediate grantee of the state, and they cannot be any the less so now because subsequently purchased by a railroad company, unless held and appropriated by it to the proper purposes of the corporation in the construction and operation of its railroad, in which case commuted taxation in the form of a percentage on its gross earnings would apply. There is no claim, however, that these lands are held or used for any such purpose. The railway company, however, contends that as the lands in question were granted by the United States to the state, for the purpose of aiding in the construction of certain lines of railway, the state had no authority to dispose of them for the purposes expressed in the ninth section of the act of 1877. But as was held in *Western R. Co. v. De Graff*, *supra*, the railway company is not in a position to raise this question. No one but the United States can complain that the conditions subsequent annexed to the grant to the state have not been complied with or have been violated. The contention of the company is suicidal, for the only title it has to these lands is derived from this sale of the state to Eaton. Whatever rights it has to the land grant formerly held by the St. Paul & Pacific Railway Company flow from the same act of 1877, by the seventh section of which the privileges and grants it conferred were expressly 'subject, however, to the exceptions, limitations, terms, and conditions hereinafter mentioned,' and by the ninth section these lands were expressly reserved and retained by the state."

STATE *ex rel.* BELL

v.

HARSHAW, Treasurer, etc.

(Wisconsin Supreme Court, March 18, 1890.)

Exemption from Taxation—Duration—Patents for Lands Granted.—When, by statute, lands are granted to a railroad company to aid in the construction of its road, and it is provided that patents for the lands earned shall be issued to the company on completion of each section of 20 miles, and a subsequent statute provides that all lands theretofore patented, or which might thereafter be patented by the state to the company "are hereby exempted and shall remain exempt from taxation * * * for the period of 10 years," the exemption takes effect immediately as to all lands acquired by the company under the grant, and is limited to a period of 10 years from the date of the statute conferring it, and does not extend to a period of 10 years from the date of the respective patents for the lands.

Percentage in Lieu of Taxation—Nature—Apportionment to Counties.—A statute granting lands to a railroad company provided that the company should at specified times "make a report of its gross earnings for the preceding year, and shall each year during the continuance of the exemption" pay to the state "a sum equal to 5 *per centum* of its gross earnings for the preceding year, which shall be in lieu of all other license fees exacted from said company," and also provided that the state treasurer should apportion the money so received among the several counties and pay over the same. *Held*, that the 5 *per centum* so received by the state treasurer was not in effect a tax upon the gross earnings of the line of the road for the preceding year, but was merely the license fee for the year in which it was paid, and that the counties had no claim to a proportion of the percentage paid by the company to the state treasurer in the year following that in which the exemption expired.

Same—Payment after Expiration of Statute—Right of Counties.—Although the state treasurer received such sum from the railroad company as the percentage payable in consideration of the exemption granted, yet as it was paid after the expiration of the exemption, he was under no duty to the several counties to pay over the same to them, the payment to him of a sum which was not due being a matter entirely between him and the railroad company in which none of the counties had any concern.

Same—Payment to Counties—Appropriation.—Under the provision of the Wisconsin constitution that "no money shall be paid out of the treasury except in pursuance of an appropriation by law," the state treasurer has no authority to pay over the sum so received after the expiration of the exemption, the law authorizing the apportionment among, and payment to, the counties having expired by its own limitation.

This is an application on behalf of the counties of Bayfield and Burnett for a writ of *mandamus* to compel the apportionment and payment of \$47,207.09, now in the hands of the state treasurer, pursuant to chapter 22, Laws 1879. The relation alleges, in effect, the acts of congress of June 3, 1856,

and May 5, 1864, granting to this state a large quantity of public lands to aid in the construction of a railroad from the St. Croix river or lake to the west end of Lake Superior and Bayfield, upon conditions specified in said acts; that by chapter 126, Laws 1874, the legislature of this state, for the purpose of aiding in the construction of said road, granted to the North Wisconsin Railway Company all the right, title, and interest which said state then had, or which it might thereafter acquire, in and to all of said lands applicable to said line of road, upon the performance of the conditions therein prescribed. The relation then sets out in full said chapter 22 of the Laws of 1879, which went into effect February 21, 1879, and further alleges, in effect, that May 25, 1880, articles of consolidation by and between said North Wisconsin Railway Company and the Chicago, St. Paul & Minneapolis Railway Company, a corporation then duly organized and existing under the laws of Wisconsin, were executed and recorded as required by law, by which articles there was created and incorporated pursuant to the laws of this state, and has ever since continued to exist, a new corporation, under the name of the "Chicago, St. Paul, Minneapolis & Omaha Railway Company," and which, for convenience, will be hereafter called the "Omaha Company:" that by said articles of consolidation and incorporation the Omaha Company thereupon became, and ever since has been and now is, the successor, owner, and entitled to the possession, of all the property, franchises, rights, powers, privileges, and immunities, including all exemptions from fees and taxes, which had been provided by law, acquired by, granted to, or was at the time of said consolidation owned by, its predecessors; that said North Wisconsin Railway Company duly accepted all the terms and conditions contained in both the acts mentioned, and began within the proper time the construction of said railroad, and its successor continued such construction, as provided by said acts, until December 3, 1883, when the same was fully completed and duly accepted by the state; that from time to time during the progress of and subsequent to the completion of said railway, upon due proof of the compliance of said North Wisconsin Railway Company and its successor with the terms of said laws, the governor of the state caused to be issued to said last named company and its said successor proper patents to said lands; that a large amount thereof was so patented in each of the years 1874 and 1875, and each of the years 1880 to 1885, inclusive; that said North Wisconsin Railway Company and its said successor have in all things fully performed and fulfilled, or are ready and willing to do so, all the provisions of said laws,

and each of them, on their part; that the North Wisconsin Railway Company and its said successor have from year to year, since the passage of said chapter 22, made a report of its gross earnings for the preceding year, paid to the state treasurer the 5 per centum thereof, and prepared and filed with the state treasurer and the several county treasurers the list of exempt lands, at the times and in the manner prescribed by sections 6 and 7 of said act; that during 1889 the said Omaha Company, as such successor, has paid to the state treasurer the sum of \$47,207.09 as a 5 per centum of the gross earnings of its Northern Division, for the respective months of the years 1888, aggregating \$944,141.77, as required by said chapter 22, and no other act, and the same was known to said treasurer at the time, and that he receipted for one-half the amount thereof February 9, 1889, and the other half thereof August 5, 1889; that, on the gross earnings of the other divisions of said Omaha Company's road for 1888, it paid at the same time, to said state treasurer, a 4 per centum license fee, as provided in sections 1211-1213, Rev. St.; that said Omaha Company, as such successor, was August 1, 1889, the owner, under patents from the state issued since 1880, of 163,186 acres of land, the larger portion of which was situated in said counties of Bayfield and Burnett. The relation also shows the number of acres exempt under said chapter 22, each year since its passage, the names of the counties within which they are situated, and the amount apportioned to each of said counties for each of said years pursuant to that chapter. It is also therein alleged, in effect, that by the terms of said chapter 22 it became and was the duty of said state treasurer, upon the receipt of said list or statement of exempt lands for 1889, to apportion the said \$47,207.09 among said several counties upon the basis of the total acreage of land so exempt, and thereupon transmit, before September 15, 1889, to the county treasurer of each county in which such exempt lands are situated, the amount to which such county was, upon said basis, entitled; that, disregarding his said duty, in violation of said chapter 22, said state treasurer upon receiving said list, refused and neglected, and refuses and neglects, to either apportion or pay over to any or either of said counties the amount mentioned, or any part thereof; that the several counties named in which such exempt lands are or were situated have fully observed the provisions of said law; that subsequent to September 15, 1889, and prior to the regular annual meeting, in November, of the several county boards of said counties, due demand was made on said state treasurer that he apportion and pay over said sum to said several counties in the manner provided in said chapter 22, but that he

refused, and still does refuse, to so apportion or pay over said sum, or any part thereof; that among the reasons given by said state treasurer for such refusal is that said chapter 22 expired by its own limitation February 21, 1889, and that said counties have no right or interest in the sum named, or any part thereof.

To such relation the said Harshaw made return as required by law, which return consisted largely of admissions, and among other things admitted, in effect, that said North Wisconsin Railway Company and its successor has since the passage of said chapter 22 made report of its gross earnings for the preceding year, and paid to such treasurer 5 per centum of said earnings upon its Northern Division, now owned and occupied by the Omaha Company, and that said 5 per centum of its gross earnings for the year 1889 amounted to the sum stated, and that said sum was received by him from said company; but he expressly therein denies, in effect, that said amount was paid by said Omaha Company or received by said state treasurer as and for said 5 per centum provided by said chapter 22, and alleges, in effect, that said moneys were paid at the same time with the other license fees referred to in the relation, and received from said company, and, in a gross sum, was transmitted to said treasurer, he receiving the same, and the whole thereof, as a license fee for the operation of all the lines of said Omaha Company in Wisconsin; that in the year 1879, and after the passage of said chapter 22, and on or before August 15, 1889, the said North Wisconsin Railway Company duly prepared and filed in the office of the state treasurer a list of all lands for which they had received patents which were exempt under the provisions of said chapter 22, showing the location of such lands as were located in the counties of Barrow, Burnett, Polk, and St. Croix, and that said company paid to the state treasurer during the year 1879, and on or before August 10, 1879, a sum of money equal to 5 per centum of the gross earnings received by said company, as shown by its record then on file in the office of said treasurer, and that the said moneys received were apportioned between the above-named counties, and duly transmitted and paid to them, the amounts paid each of said counties appearing upon Exhibit D, attached to said relation; that said North Wisconsin Railway Company and the said Omaha Company, as its successor, have for each year subsequent to 1879, up to and including 1888, duly filed said list of exempt lands, and paid to the treasurer of the state the sum of 5 per centum upon the gross earnings of the North Wisconsin Railway Company, now known as the "Northern Division," and that the amount received during said years, re-

spectively, from said company or companies, has been duly apportioned between the counties in which said lands were located, as shown by said Exhibit D; that the Omaha Company duly filed the list of lands before August 15, 1889, showing the location of lands still held by it, being the number of acres and in the counties as shown by said Exhibit D, but that said treasurer has refused to apportion the amount of license fee paid by said company upon said Northern Division among the counties in which said lands are located, for the reason, as he is advised and verily believes, that the time for which said lands were exempt from taxation as provided by said chapter 22 had expired before the filing of said list or the payment of said license fee, and, having so expired, that none of the counties named in the petition or shown upon said Exhibit D were entitled to receive said money, or any portion thereof. To such return so made by said state treasurer the relator demurs on the ground that it does not state a defense to said relation.

The respondent Timme moves the court to quash such alternative writ, as to him, on the ground, in effect, that the petition does not set forth facts sufficient to impose upon him the duty of issuing warrants for said money upon the state treasury.

Richmond & Smith for relator.

L. K. Luse, Asst. Atty. Gen., for respondent.

CASSODAY, J.—The grant to the North Wisconsin Railway Company, by chapter 126, Laws 1874, was upon the express condition that the said company should immediately proceed with the construction of said road, and should construct so much thereof the first year as should with that already constructed, make 40 miles, and not less than 20 miles each year thereafter, and that the whole should be completed within seven years after the passage of said act; and the act required the company, upon acceptance, to give a bond, as prescribed, for the performance of such condition, with a forfeiture in case of failure; and the governor was therein required, as often as “satisfactory proof that twenty continuous miles” of said road should be completed, as required, to issue and deliver, or cause to be issued and delivered, to said company, patents in due form, from the state, for 200 sections of said lands. That act contained no exemption of the lands to be so patented, from taxation. Had that act been complied with, the whole of that line of the road would have been completed in 1881, and the company then would have been entitled to all its patents. Of course, as fast as any portion of said railway

Statutes conferring exemption.

was completed and went into operation, it was required, as the law then stood, to pay the license fee prescribed by the General Statutes then in force. Sections 1211, 1213, Rev. St. Section 2, chap. 113, Laws 1875, provided that "all those railroad companies whose lines of road are now incomplete or are in process of construction, and to aid in the building of which the general government has donated grants of land, and which are not exempted from taxation on said lands for the next five years, are hereby exempted from the payment of the license fees required by law for said five years." That section applied to the North Wisconsin Railway, then incomplete and in process of construction, and exempted that company from the payment of such license fees for the said period of five years; that is to say, to January 1, 1880. Section 1212, Rev. St., (chapter 261, Laws 1878,) provided, in effect, that the lands applicable to the construction of said road, by said company, through the counties of Ashland and Bayfield, and which might be acquired by the construction of the same, "shall be and remain exempt from all assessments and all taxation of every kind for the period of five years from the time such company acquires title to the same," except that whenever any of said lands should be sold, contracted to be sold, or leased, the same should immediately become subject to taxation; but that exemption was subject to the condition that not less than 20 miles of said road, commencing at some point between Ashland and Bayfield, should be completed before April 2, 1880, and provided that the act should only apply to said lands in those two counties. Section 1, chap. 22, Laws 1879, provided, in effect, that all lands theretofore patented by the state to the said North Wisconsin Railway Company not theretofore sold, or contracted to be sold, by said company, and all lands which might thereafter be patented by the state to the said company, under chapter 126, Laws 1874, "are hereby exempted, and shall remain exempt, from taxation of all kinds, general and local, and from assessments of every nature, for the period of ten years." Section 4 of the act provided, in effect, that whenever any of the lands so exempted should be sold, contracted to be sold, leased, or conveyed, or the pine thereon sold or cut, the same should immediately become taxable. Section 5 of the act declared, in effect, that the main object and purpose of the act was to aid in securing the completion and equipment of said railway, and to enable the company to apply the avails of its lands to such construction and equipment; the exemption therein provided being, in the opinion of the legislature, necessary for said purposes, and demanded by the public interest. Section 6 of the act provided, in effect, that the said North Wis-

consin Railway Company should, "at the times and in the manner fixed by the Revised Statutes for similar reports from other railroads of the state, make a report of its gross earnings for the preceding year, and shall each year, during the continuance of the exemption provided by section one, pay into the state treasury, at the times fixed by the Revised Statutes for the payment by railway companies of their license fees, a sum equal to five per centum of its gross earnings for the preceding year, which will be in lieu of all other license fees exacted from said company." Section 7 of the act provided, in effect, that the company should, on or before August 15th in each year, cause a sworn list of the lands owned by it August 1st in such year in each of said several counties, and exempt from taxation, to be prepared, and to file a copy thereof in the office of the state treasurer, and also send a copy thereof to the treasurers of said counties, respectively. Section 8 of the act provided, in effect, that the state treasurer, on the receipt of said list, should apportion the amount of money so received from the company among said several counties as they might be entitled to the same under that act, and thereupon pay over the same to said counties, respectively. The 5 per centum thus to be apportioned among, and paid to, the respective counties named, was a sum equal to 5 per centum of the gross earnings of the company for the preceding year, as required by section 6 of the act. By that section, such 5 per centum was only to be paid into the state treasury at the times fixed by sections 1211-1213, Rev. St., for the payment by railway companies of their license fees for "each year during the continuance of the exemption provided by section one" of that act. The material question for consideration, therefore, is, when did the exemption prescribed by section 1 of the act commence, and how long did it, or was it to, continue?

The learned counsel for the relator contends that the words, "are hereby exempted, and shall remain exempt, from taxation of all kinds, * * * for the period of ten years," should be construed as not commencing, as to any batch of lands subsequently patented by the state to the company, until they were in fact so patented, and then, as to that batch, continue for the period of 10 years from the date of such patents, unless in the meantime the company should part with the title, or sell or cut the pine thereon, and that the same rule would apply to each and every batch so subsequently patented. A moment's reflection as to the facts and circumstances existing at the time of the passage of the act, and the law applicable, will reveal the endless confusion that such a construction

Exemption
commences
from date of
statute.

would necessarily create. As indicated in the foregoing statement, at the time that section went into effect a large portion of said lands had been patented to the company by the state; and many of them had been expressly exempted from taxation and were still exempt. Only a portion of the line of road however, had been constructed. As often as 20 miles of the road was subsequently constructed, the company was entitled to a new batch of patents therefor. The whole was not completed until December 3, 1883. Of course, such land-grant lands, even in the place limits, only became taxable as fast as they were earned by such construction, and certified to by the state authorities. But none of such lands as were situated in the indemnity limits, even though so earned and so certified to, became taxable until actually selected, and such selections actually approved by the secretary of the interior. *Wisconsin Cent. R. Co. v. Price Co.* 133 U. S. 496, *ante*, p. 669, in part reversing 64 Wis. 579. As there held, no constructive approval would render them taxable. Quite likely, some of those lands have not yet been so approved; and as to them, on the theory of counsel, the 10 years would not begin until such approval. That theory would obviously lead to almost endless confusion, and should not be adopted unless imperatively demanded by the language of the section. The words "exempted," and "remain exempt, * * * for the period of ten years," pretty clearly indicate that the legislature only contemplated one 10-years period of exemption, and that that should include all such lands whether previously patented and then exempt, or exempt by reason of not yet having been earned and certified, or such as should be subsequently patented. This construction is strengthened by the well-settled rule in such cases repeatedly sanctioned by the supreme court of the United States, and very recently in these words: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*." *Yazoo & M. V. R. Co. v. Thomas*, 132 U. S. 185, 37 Am. & Eng. R. Cas. 392; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 668, 24 Am. & Eng. R. Cas. 500, and cases there cited. We must hold that the period of 10 years of such exemption commenced February 21, 1879, and completely terminated as to any and all lands to which it was or could become applicable, February 21, 1889.

But it is contended by counsel for the relator that, even if such be the true construction of the section, yet that the 5 per centum so received by the state treasurer in 1889 was, in

effect, a tax upon the gross earnings of that line of road for the year 1888, and hence that, the counties in question were, respectively, entitled to their share of the same. The sixth section, however, provides, in effect, that such license fees to be so paid by said company for any current year should be "a sum equal to five per centum of its gross earnings for the preceding year," payable at the times fixed in the Revised Statutes. Sections 1211-1213. In other words, that section and these Revised Statutes merely prescribed that as the way for measuring and ascertaining the amount of such license fee for the year in which it was paid, and not as a tax on such gross earnings for such preceding year. *State v. McPetridge*, 56 Wis. 256. Under this construction, the counties in question, respectively, received their proportionate share of such license fees collected under said chapter 22 in the year 1879, and each of the following years, down to and including 1888, making 10 consecutive years in all, or, in other words, the full period of such exemption. This fully appears from the relation, as well as the return.

Nature of percentage upon gross receipts.

But counsel for the relator further contend that, even if such constructions are correct, and the counties in question have no legal right to the license fees so collected for the year 1889, yet that as the company voluntarily paid them as such 5 per centum under said chapter 22, and the state treasurer received them as such, he thereby became a mere trustee for said counties, and hence is estopped from denying such trust, or refusing to execute the same by apportioning and paying over the money. There are several difficulties in the way of such contention. In the first place it must be admitted that he received the moneys as state treasurer, and not as a mere individual. His duties as such state treasurer were prescribed by law. Since the law, as we have found, did not require him to apportion and pay that money over to the counties in question, it is very obvious that he, as such treasurer, owed no duty to them to do so. Besides, it appears from his return that he received said money, with all other license fees due from the Omaha Company, in gross, and receipted for the whole, and did not receive them specifically, as 5 per centum paid under said chapter 22; and he very properly claims that he is entitled to four-fifths of said \$47,207.09 as the amount due the state from the company for the year 1889, under sections 1211-1213, Rev. St., and that, if he is not entitled to hold the other fifth, it is a matter entirely between the state treasurer and the Omaha Company, as to which none of the counties in question, as counties, have any

Right of counties to percentage paid after expiration of statute.

concern. We are constrained to believe that such are the legal rights of the parties.

But there is still another reason which seems to be a perfect bar to the claim of the relator, regardless of whether one-fifth of the amount named is rightfully or wrongfully in the hands of the state treasurer. It is enough to know that the whole amount is now in the state treasury, and that the constitution provides that "no money shall be paid out of the treasury except in pursuance of an appropriation by law." Section 2, art. 8, and amendment to the same. Since there is no law authorizing such apportionment among and payment to the counties in question, the state treasurer has no lawful right to make the same. The demurrer to the return is overruled, and the alternative writ of *mandamus* is quashed.

Necessity of
appropriation.

STATE *ex rel.* WINE, Collector.

v.

KEOKUK & WESTERN R. CO.

(99 Mo. 30.)

Consolidation—Missouri Statute—Effect upon Old Companies.—A consolidation effected under the Missouri Act of March 2, 1869, relating to the consolidation of railroad companies organized under the laws of the state which connect with railroad companies organized under the laws of adjoining states, and which provides that the stock of the two companies shall be surrendered and new stock issued in its place and a new corporate name adopted, calls into existence a new corporation and operates a dissolution of the old corporations, and does not merely amount to the merger of the stock and property of one corporation in another.

Exemption from Taxation—Effect of Consolidation.—Notwithstanding the provision of the act of 1869, that the consolidated company shall be subject to the liabilities and obligations of the company within the state, which is consolidated with one in the adjoining state, and shall be "entitled to the same franchises and privileges under the laws of this state" as if the consolidation had not taken place, the consolidated company is not entitled to the benefit of a statutory exemption from taxation in favor of the old company, the provision of the Missouri constitution of 1865, that no property shall be exempt from taxation, having taken away the power of the legislature to grant consolidated companies an exemption from taxation.

Same—Decision of Suit for Taxes of Previous Year—Res Adjudicata—Rule of Property.—The decision of the court in an action for taxes of a previous year which assumed that the consolidated company succeeded to the privileges of the old company, and that the provision of the constitution did not operate to repeal the redemption, does not constitute any bar to an action for the taxes of a subsequent year, either upon the ground that the question is *res adjudicata* between the parties, or upon the ground that rights

have been acquired upon the faith of the ruling in that case, although it appears that the question of law was involved in the previous suit, but was not argued or considered.

APPEAL from Circuit Court, Scotland County.

F. T. Hughes for appellant.

John M. Wood and *John C. Moore* for respondent.

BLACK, J.—This is a suit in the name of the state to the use of Wine, collector of Scotland county, to enforce the payment of state, county, school, and municipal corporation taxes levied on the property of the Facts. Missouri, Iowa & Nebraska Railway Company for the tax year ending in August, 1886. The defendant corporation became the purchaser of the railroad property after the taxes were levied, and the defense is that the property was exempt from taxation while owned by the Missouri, Iowa & Nebraska Railway Company. The circuit court ruled against the defendant, and hence this appeal.

The legislature, by the act of February 9, 1856, (Acts 1856, p. 94,) incorporated the Alexandria & Bloomfield Railroad Company, with power to build a railroad from Alexandria, in Clark county, in the direction of Bloomfield, in the state of Iowa, to a point on the line between this and that state. The act provides that the construction of the road shall be commenced within ten years after its passage, and completed within ten years thereafter, and that "the stock of said company shall be exempt from taxation for a period of twenty years after its completion." It is alleged in the answer, and not denied, that the company was duly organized in 1864, and then commenced and proceeded to carry out its proper business and railroad operations under the act. The name of the company was changed to that of the Alexandria & Nebraska City Railroad by authority of the act of February 19, 1866, (Acts 1865-66, p. 222.) There are several sections in this act, and the fourth section provides that the whole or any section thereof shall be adopted by the board of directors, and shall be in full force from and after the adoption. It is alleged, and not denied, that the company adopted the first section, which authorized the change of name; but it does not appear that any of the other sections were adopted. The Alexandria & Nebraska City Railroad Company and the Iowa Southern Railway Company, a corporation organized under the laws of the state of Iowa, were consolidated on the 3rd May, 1870, under the name of the Missouri, Iowa & Nebraska Railroad Company; thus forming one continuous line from Alexandria, on the Mississippi, in this state, to a point in the state of Iowa near Nebraska City on the Missouri

river. It was admitted upon the trial that the railroad was constructed and put in operation through Scotland county in 1871, and completed to the state line in December, 1872. It does not appear how much work had been done in this state before the consolidation. In 1886, and after the taxes in question had been levied, the entire consolidated road was sold, under a decree of foreclosure entered in the circuit court of the United States for the southern district of Iowa, to certain individuals, who conveyed it to the defendant corporation, the Keokuk & Western Railroad Company. The period of 20 years' exemption had not expired when the taxes in question were levied by the county court of Scotland county. The general question, therefore, is whether the property was exempt from taxation while owned by the consolidated company.

It was held in the case of *Scotland County v. Missouri, I. & N. R. Co.*, 65 Mo. 123, brought to recover taxes for the year 1872, that the exemption of the stock of a corporation is an exemption of the property represented by the stock. The court then proceeds to say: "That the present defendant succeeded to all the privileges and liabilities of the Alexandria & Bloomfield Company is conceded. It is insisted, however, that § 16, art. 11, of the constitution of 1865, operated to repeal the exemption contained in the defendant's charter." It was then held that the designated section of the constitution did not, and could not, destroy rights existing when it was adopted, and that the legislature did not repeal the exemption by the tax law of March, 1871. As to the question actually considered in that case, it is sufficient to say we are satisfied with what was then said and ruled. The question whether the consolidated company succeeded to the right of immunity from taxation contained in the charter of the Alexandria & Bloomfield Company was then taken for granted, on what appears to have been a concession of counsel in this court; and that question we will now consider.

The consolidation of the rights, privileges, franchises, and properties of two or more railroad companies into one, where there is no provision of the statute or constitution to the contrary, leaves the portions of the road thus formed subject to the same rules of taxation that existed before the consolidation. That portion of new line which was exempt will continue to be exempt, and that portion which was subject to taxation will continue subject to taxation. This, we think, is the result of the following cases: *Philadelphia & W. R. Co. v. Maryland*, 10 How. (U. S.), 376; *Tomlinson v. Branch*, 15 Wall. (U. S.), 460; *Central*

Decision in
previous suit.

Effect of con-
solidation.

R. & B. Co. v. Georgia, 92 U. S. 665; Chesapeake & O. R. Co. v. Virginia, 94 U. S. 718. The Alexandria & Nebraska City Railroad Company was unquestionably exempt from taxation down to the time of the consolidation, namely, 3rd May, 1870; and, under the rule of the cases just cited, the new company acquired that immunity, so far as concerns the Missouri property, unless the law under which the consolidation was effected by the voluntary act of the two corporations produces a different result. The sixteenth section of article 11 of the constitution of 1865, which went into operation before the date of the act under which the consolidation took place, provides: "No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state." The plaintiff takes the ground that, when two railroad companies are consolidated, they thereby surrender their charters, and the resultant company takes its powers and rights from the law which authorized the consolidation; in other words, that the old companies are dissolved, and that a new one springs into existence. If it be true that the Alexandria & Nebraska City Company was dissolved by the act of consolidation, and the new company took its powers from the act authorizing the consolidation, then it must follow that the new company is not exempt from taxation; for the legislature had been deprived of the power to grant such immunity.

Whether the old companies were dissolved must depend upon the terms and provisions of the act of March 2, 1869, (Acts 1869, p. 75,) under which the consolidation took place; and we therefore set out the important portions of it. Section 1 provides "that any railroad company, organized under the general or special laws of this state, whose track shall, at the line of the state, connect with the track of the railroad of any company organized under the general or special laws of any adjoining state, is hereby authorized to make and enter into any agreement with such connecting company for the consolidation of the stock of the respective companies whose track shall be so connected, making one company of the two, whose stock shall be so consolidated, upon such terms and conditions and stipulations as may be mutually agreed between them, in accordance with the laws of the adjoining states in which the road is located, with which connection is thus formed." By section 2, the terms and provisions of the agreement must be approved by the holders of a majority of the stock in each of the companies at a meeting called for that purpose, or by

Provisions of
Missouri
statute.

writing signed by them. Section 3 provides : After the terms of the consolidation have been agreed to in one or the other of the modes above set forth, " it shall be competent for the boards of directors in each of said connecting companies to carry the same into effect, and adopt by a resolution a new corporate name for the company which shall be formed by the consolidation, and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of consolidation ; and a copy of said consolidation agreement and the resolutions of consolidation, and the name adopted for the new company, shall be filed with the secretary of state, and shall be conclusive evidence," etc. The fourth section is in these words : " Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations, of the company within this state which may be thus consolidated with one in the adjoining state, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the state, and be entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not taken place."

In *Banking Co. v. Georgia*, *supra*, the legislature of Georgia had created two corporations,—the Central Company and the Macon & Western Company. Their charters limited the right of taxation to one-half of 1 per cent. upon their net income. The companies were consolidated under an act passed in 1872 ; and the question was whether there was a surrender of the charter of the Central Company. The court said : " It may be that the consolidation of two corporations, or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and of the intention therein manifested." It is further held that there was no surrender of the charter of the Central Company, but the ruling goes upon the ground that the act only contemplated a merger of the property and franchise of the Macon & Western Company into the Central Company ; the latter retaining its name and charter. In *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, two railroad companies had been incorporated under the laws of Georgia,—one in 1847, and the other in 1856. By their charters they were exempt from taxation beyond a specific amount on their net income. They were consolidated under an act of that state passed in 1863, which gave them power to consolidate their stocks, and, when consolidated, to be known as " The Atlantic & Gulf Railroad Company." By

that name the stockholders of the companies were empowered to sue and be sued, to purchase and enjoy real and personal property, and to exercise corporate powers. The act also declared that the immunities, franchises, and privileges granted by the charters of the two companies should continue in force, except so far as they might be inconsistent with the act of consolidation. Under an act passed in 1874, the property of the new company was taxed as other property. This act of 1874, it was held, would be void, as impairing contracts, but for the act of 1863; and the court, in considering the effect of the consolidation, said: "Did the consolidated companies become a new corporation, holding its powers and privileges as such, under the act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the legislature, as expressed in the consolidating act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of *Central R. & B. Co. v. Georgia*, 92 U. S. 665. Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies; thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being?" The court then goes on to say, in substance, that, as this new corporation took its powers and privileges from the act of 1863, it took them subject to the laws then in force, and as a result the tax act of 1874 was held to be valid and binding on the new company. The same line of reasoning is pursued in the tax cases of *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, and in *Atlanta & C. A. L. R. Co. v. State*, 63 Ga. 483. The effect of consolidating three railroad companies into one, says the court in *McMahan v. Morrison*, 16 Ind. 172, "was a dissolution of the three companies named, and at the same instant the creation of a new corporation." A recent text-book says: "The franchises of a corporation formed by the consolidation of several companies are derived wholly from the act of the legislature authorizing the consolidation." 2 *Mor. Priv. Corp.* (2d Ed.) § 944. The same doctrine is asserted in terms,

more or less positive, in the following cases: *Clearwater v. Meredith*, 1 Wall. (U. S.), 38; *Shields v. Ohio*, 95 U. S. 323; *Lauman v. Lebanon Val. R. Co.* 30 Pa. St. 42.

Now, the Alexandria & Bloomfield Company had, by its charter, a capital stock of \$2,000,000, divided into shares of \$100 each. The act of 1869 contemplates and provides for the surrender of the stock in both of the uniting companies; and accordingly we find it provided in the articles of consolidation that the stock issued by each of the companies and outstanding, shall be surrendered, and shares of stock of the consolidated company issued therefor. The act speaks of the consolidated company as "the new company:" and the very process by which it is brought into being makes a new company, and the effect of the consolidation was to dissolve both of the old companies. It is true, the act of 1860 does not specially enumerate the corporate powers and privileges conferred upon the new company, but the corporate powers and privileges are granted by reference to the powers of the company in this state which unites with one of another state. There is in this respect some difference between this case and that of *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359. But as said in *Maine Central R. Co. v. Maine*, 96 U. S. 496, a new corporation may be as readily created by the union of two or more companies as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration. The conclusion is irresistible that the Missouri, Iowa & Nebraska Railroad Company is a new corporation, created under and by force of the act of 1869. Being thus created after the adoption of the constitution of 1865, the legislature had no power to grant to it exemption from taxation. The exemption, therefore, did not, and could not, pass to the new company. We cannot see that the fact that one of the consolidating companies was a Missouri, and the other an Iowa, corporation, affects the conclusion just stated. The new company, in this state, is entitled to the privileges and subject to the obligations imposed upon it by the laws of this state; and in Iowa it is a corporation of that state and subject to the laws thereof. By the legislature of both states, however, it is but one company.

We are cited to a number of cases which were suits on bonds, and involved the legality of subscriptions made by counties to railroad corporations. In some of the cases the subscriptions were made to this consolidated company, but we do not see that any of them are decisive of the question in hand. It must be kept in mind that exemption from taxation will not be recognized, unless granted in terms

too plain to be mistaken. *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569, 29 Am. & Eng. R. Cas. 200; *St. Louis v. Trust Co.*, 47 Mo. 150, 155. Such an exemption is a personal privilege, and cannot be assigned except by legislative authority. *State v. Chicago, B. & K. C. R. Co.*, 89 Mo. 536. If the consolidated company is in any sense a new corporation, taking its powers to be a corporation and its privileges from the act of 1869, then it cannot in justice claim the exemption; for the legislature was powerless to make new grants of that charter. It seems to us the tax cases before cited are quite conclusive. The answer sets up the proceedings in the suit of *Scotland Co v. Missouri, etc., R. Co.*, before mentioned, and reported in 65 Mo. 123. That suit was commenced in 1873 to recover county and school taxes levied for the year 1872. The judgment which was for defendant, was affirmed in 1877. It is also alleged in the answer, and not denied, that James SeCor and others, stockholders in the consolidated company, filed their bill in the circuit court of the United States for the eastern district of Missouri to enjoin the company from paying taxes levied by Scotland, Clark, and Schuyler counties, and to enjoin the county courts, judges thereof, and collectors of said counties from collecting any taxes levied upon the property of the company for the year 1881 or previous years; and that the temporary injunction was made perpetual on the ground that the property of the company was exempt from taxation. According to the answer, the bill was filed in 1881. The case seems to have been determined in 1881. 9 Fed. Rep. 809.

The taxes sued for here are for the year 1886, and they accrued long after those suits were commenced and determined. This suit is for a separate and distinct cause of action, and for this reason we do not see how the former judgments can be a bar to the prosecuting of this suit. *City of Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 633. But we do not understand it to be claimed by the defendant, in this court, that those former judgments operate as a technical bar. The claim is that rights have been acquired on the faith of the ruling in the *Scotland County Case*, followed in the injunction case; and to make a different ruling at this time would be to impair the obligation of contracts, and therefore violative of the constitution of the United States. The answer to this is that this court did not then pass upon the question whether the exemption from taxation passed to the consolidated company. The question of law was doubtless involved in the agreed facts in that case, but there were many other questions then controverted, and they were decided, and we adhere to what was then said in respect of the propositions of law which were actually, con-

Res adjudicata—Rule of property.

sidered. It seems to have been asserted on one side, and conceded on the other, in this court at least, that the exemption did pass to the consolidated company, if the exemption clause in the Alexandria & Bloomfield Company had not been repealed; and the court simply stated the question as not a controverted one in that case. All this appears from the decision itself, and we do not see how it can be said the question which we have been considering was decided in that case. The proposition that the legislature can, in the face of the constitution of 1865, exempt property from taxation, is not to be regarded as established because of a concession made by counsel in some former case. It cannot be fairly said there was a solemn adjudication upon the point we have been considering. The judgment is affirmed.

Exemption from Taxation—Effect of Consolidation.—In *Keokuk & Western R. Co. v. County Court of Scotland Co.*, 41 Fed. Rep. 305. THAYER, J., of the Federal Circuit Court of the Eastern District of Missouri, N. D., dismissed a bill for an injunction restraining the collection, or attempted collection of taxes against the railroad company, and followed the decision of the principal case in all respects. He said:—"This is a proceeding begun on February 13, 1888, against the county courts of Scotland, Clark, and Schuyler counties, Mo., and against the several persons who at that time were judges of said courts, and also against the several collectors of revenue for said counties, to restrain them from collecting, or attempting to enforce the collection of, certain taxes assessed against a certain railroad extending through the counties aforesaid, which at the date of the filing of the bill belonged to and was being operated by complainant, the Keokuk & Western Railroad Company. The property in question formerly belonged to the Missouri, Iowa & Nebraska Railway Company. Complainant acquired title thereto and possession on December 3, 1886, by virtue of foreclosure proceedings under a mortgage executed by the Missouri, Iowa & Nebraska Railway Company. The taxes in dispute had been assessed during the ownership of the mortgagor company, and complainant's contention is, in brief, that the property in question was exempt from taxation while owned by the mortgagor company. That it was exempt from assessment after the purchase by the Keokuk & Western Railroad Company is not claimed. Six months before the present bill was filed suit was instituted against the complainant in the state circuit court, under the revenue laws of the state, to recover a portion of the same taxes that form the subject of contention in this proceeding. That suit has recently been decided by the supreme court of the state, and it was held, in an elaborate opinion, that that portion of complainant's railroad situated in the counties of Clark, Scotland, and Schuyler, in this state, was not exempt from taxation while owned by the Missouri, Iowa & Nebraska Railway Company. *State v. Keokuk & W. R. Co.*, ante, p. 694. The facts on which the claim of exemption from taxation is predicated are fully stated in the opinion last referred to. It will suffice to say that the exemption claimed was contained in a special charter granted to the Alexandria & Bloomfield Railroad Company, on the 9th of February, 1857, (Sess. Laws Mo. 1857, p. 94;) that the last-named company, by legislative permission, first changed its name to the Alexandria & Nebraska Railroad Company, and thereafter, on May 3, 1870, became consolidated with the Iowa Southern Railway Company, a corporation of Iowa, under the name of the Missouri, Iowa & Nebraska Railway Com-

pany; and that the consolidation proceedings were had under the provisions of a law enacted in the state of Missouri on March 2, 1869, (Sess. Laws Mo. 1869, p. 75.) The supreme court of the state decides, in effect, that the consolidation proceedings operated as a surrender of the immunities and franchises of the Alexandria & Bloomfield Railroad Company, to which the exemption was originally granted, and to dissolve that corporation; that, by virtue of the consolidation proceedings, a new corporation was created, which derived all of its powers and franchises in Missouri from the consolidation act of 1869; and that, inasmuch as that act was passed after the adoption of the constitution of 1865, which prohibited legislative grants of exemption from taxation, (section 16, art. 11,) no immunity from taxation was or could be acquired by the Missouri, Iowa & Nebraska Railway Company, by virtue of the consolidation act in question. The decision is therefore conclusive of the present controversy, if it is followed. I have assumed, in accordance with what seems to be the doctrine established by the case of *Louisville & N. R. Co. v. Palmes*, 109 U. S. 256, 13 Am. & Eng. R. Cas. 380, as well as by the case of *Burgess v. Seligman*, 107 U. S. 33, 9 Am. & Eng. R. Cas. 655, that this court is entitled to express an independent judgment upon the questions involved, giving to the decision of the state court, as a matter of course, the weight and respectful consideration, as an authority upon the points involved, that the decisions of such courts are always entitled to.

"There seems to be no adequate ground for dissenting from the conclusion reached by the state supreme court in the case above referred to, that the result of the consolidation proceedings which took place on May 3, 1870, was to create a new corporation under the name of the Missouri, Iowa & Nebraska Railway Company, that derived its powers and franchises from the consolidation act of March 2, 1869, *supra*. The general disposition of both the federal and state courts seems to be, to regard consolidation proceedings, taken under such laws as that which prevails in Missouri, as operating to create a new corporation wholly distinct from the constituent corporations out of which it is formed, and with powers and franchises derived from the act under which the proceeding is taken, and from such other general laws prescribing the powers of corporations as at the time prevail in the state. In addition to the authorities cited on this point in *State v. Keokuk & W. R. Co.*, *supra*, the following cases may be consulted with advantage: *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, and *Memphis & L. R. R. Co. v. Railroad Com'rs*, 112 U. S. 609. Conceding that the Missouri, Iowa & Nebraska Railway Company was a new corporation formed on May 3, 1870, and that the proceeding of that date was not a mere alliance between two old corporations, or a merger of the powers of the Iowa corporation with the Missouri corporation under the charter of the latter, the conclusion also seems inevitable, considering the federal decisions on the subject, that the new or consolidated company did not acquire the immunity from taxation originally granted, in 1857, to the Alexandria & Bloomfield Railroad Company. The law is well settled since the decision in *Morgan v. Louisiana*, 93 U. S. 217, that exemptions from taxation, must be construed as a personal privilege granted to the very corporation named in the grant, and to have perished with it, unless the express and clear intention of the law requires that it should pass to an assignee or successor; and all grants of that character are to be construed *strictissimi juris*. *Memphis & L. R. R. Co. v. Railroad Com'rs*, *supra*. In the case of *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, it appeared that a railroad corporation of the state of Arkansas had been created in 1853, with an exemption from taxation, and also with a power under its charter to consolidate with other foreign railroad corporations under such an agreement as it deemed advisable. It executed the charter power of consolidation on

May 4, 1874, by consolidating with a Missouri corporation. The agreement of consolidation provided that 'all the rights, privileges, and franchises of each of the corporations' should pass to the consolidated company. In the meantime, however, (in 1868,) the constitution of the state of Arkansas had been amended so as in effect to prohibit exemptions from taxation, and to subject all property to like burdens. It was held by the court that, inasmuch as a new corporation had been created by the amalgamation of the two corporations, the consolidated company was subject to all laws relating to taxation in existence when the consolidation took place, and hence was not entitled to any immunity from taxation with respect to the property acquired from the original Arkansas corporation. Concerning the nature of the contract between the state and the original company, granting to the latter the right to consolidate and immunity from taxation, the court said: 'For what was the contract? Construed in the most liberal spirit in favor of the company, it cannot be extended beyond a stipulation on the part of the state that the Cairo & Fulton Railroad Company may at any time thereafter, by consolidation with any other railroad company, form and become a new corporation, with such powers and privileges as, at the time when the offer is accepted and acted upon, it may be within the power of the state to confer and lawful for the new corporation to accept. If acted upon before the law was changed, it might well be that all powers and privileges originally conferred in the charter of the Cairo & Fulton Railroad Company, including the exemption in question, would have vested in the new company. But as it was not accepted and acted upon until a change in the organic law of the state forbade the creation of corporations capable of holding property exempt from taxation, it must be presumed that, when the original company entered into the consolidation, it did so in full view of the existing law, and with the intention of forming a new corporation, such as the constitution and laws of the state at that time permitted. That, at least, we must hold to be the legal effect of the transaction.' In the case at bar it will be noted that the Alexandria & Bloomfield Railroad Company was not accorded the right to consolidate by the charter of 1857. That right was granted on March 2, 1869, after the change in the Missouri constitution prohibiting corporate exemptions from taxation. With much greater force, then, may it be said that the right to consolidate, held out by the Missouri act of 1869, was a right to consolidate subject to then existing laws as to taxation. If it be urged, in opposition to this reasoning, that the offer held out by the act of 1869 was an offer to consolidate, and at the same time to retain the exemption theretofore enjoyed, the answer thereto is twofold. In the first place, the act of 1869 contains no apt language to include the exemption in question. Exemptions from taxation are properly classed as immunities, rather than as privileges or franchises, and the act of 1869 merely promised that the new company formed should 'be entitled to the same privileges and franchises' as the Alexandria & Bloomfield Railroad Company. *Vide* § 4, Act March 2, 1869. This point was expressly ruled in the case of Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, where the words, 'shall succeed to all such franchises, rights, and privileges * * * as would have been had,' etc., were held not to include and pass an immunity from taxation. But a better answer to the objection last supposed is, that the general assembly of the state of Missouri, after the adoption of the constitution of 1865, had no power to promise to a new corporation to be thereafter formed, that it would renew in its favor, an exemption theretofore enjoyed by one of the constituent corporations that was to become dissolved by the act creating the new entity; and this point has also been expressly ruled in the case of Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 13 Am. & Eng. R. Cas. 380. Speaking of a similar prohibition to that found in the Missouri constitution

of 1865, in a case that arose in the state of Florida, where an attempt had been made by the legislature of that state to renew or extend to a subsequent corporation an exemption from taxation possessed by a former corporation whose property it had acquired, the court say: 'The inhibition of the constitution applies in all its force against the renewal of an exemption equally as against its original creation. * * * After the adoption of the constitution of Florida of 1868, there could be no corporation created capable in law of accepting and enjoying such an exemption, for that was prohibited by the constitutional provisions that have been cited.' Pages 254, 255. Strictly in line with the decision in *St. Louis, I. M. & S. R. Co. v. Berry*, *supra*, is the previous decision in *Memphis & L. R. R. Co. v. Railroad Com'rs*, 112 U. S. 609, heretofore cited. In the latter case a corporation was created in 1853 by the state of Arkansas with an exemption from taxation, and with authority to mortgage its charter. The charter having been mortgaged and sold under a decree of foreclosure, the purchasers organized as a corporation under the same, claiming all of the franchises and immunities specified therein, including the exemption from taxation. The court held, among other things, that even if the sale under the mortgage conveyed to the purchasers the right to organize as a corporation, or to become a corporation, it was merely a right to organize under such laws as might be in force when the organization took place; that such an organization would be a corporate entity, distinct from that which originally organized and executed the mortgage; and a company so formed by purchasers would be subject to taxation according to the laws in force when such organization took place, and that the immunity from taxation granted in the charter of 1853 was limited to the corporate body that first organized thereunder. It seems unnecessary to pursue the subject further. If the question whether the Missouri, Iowa & Nebraska Railway Company acquired an immunity from taxation, is still an open question, and is to be determined in the light of federal adjudications, I feel confident that the exemption cannot be sustained.

"It is insisted, however, that the exemption was heretofore upheld by the supreme court of this state in the case of *Scotland Co. v. Missouri, I. & N. R. Co.*, 65 Mo. 123; that a similar ruling was afterwards made by this court in *Secor v. Singleton*, 9 Fed. Rep. 809; and that the question has been settled in this state by these decisions, and is not open to further controversy. It is not asserted, however, (as I understand,) that the judgment referred to in the state court, or the decree in the federal court, operates as an estoppel in this proceeding, so as to preclude the defendants from denying that the Missouri, Iowa & Nebraska Railway Company was entitled to an immunity from taxation. The filing of the present bill by the complainant would seem to be an admission by it, that the decree of this court in the *Secor Case* is not available for its protection. But the contention is that the judgment and decree in the two cases established a rule of property on the faith of which complainant has acted, and hence that the rule cannot be disturbed, even though it is erroneous, according to the principles announced in *Gelpcke v. Dubuque*, 1 Wall. (U. S.), 206, and in *Burgess v. Seligman*, 107 U. S. 20, 9 Am. & Eng. R. Cas. 655, and cases cited. It is questionable whether the doctrine invoked can properly be applied to a case like the one at bar, under any circumstances. To say that, because a state court has once decided that a certain corporation is entitled to exemption from taxation, the decision must thereafter be followed, although erroneous, would involve consequences of such a serious nature that any court ought to hesitate to give its assent to such a doctrine. The exemption claimed and upheld might be a perpetual one, affecting property of the value of millions of dollars. The bare statement of the proposition that the sovereign power of taxation might be irrevocably lost in such a case,

by an erroneous decision on a point not well argued or carefully considered, would seem to be its own refutation. In the present case, however, it is clear that the decisions relied upon did not establish a settled rule of property, within the meaning of the doctrine invoked. In the case of *Scotland Co. v. Missouri, I. & M. R. Co.*, *supra*, the supreme court of the state evidently did not consider the question whether an exemption from taxation passed to the consolidated company, because it was not a controverted question in that court. The fact that the exemption was acquired by the consolidated company seems to have been taken for granted, for the reason that counsel in the case so assumed, or at least raised no issue on that point. The case of *Secor v. Singleton*, subsequently tried in this court, passed off on demurrer; the ruling on the demurrer having been followed by a decree *pro confesso* taken against the defendants. It is obvious that no questions were considered in the *Secor* Case except such as had previously been considered by the supreme court of the state. The only allusion to the question of exemption is found in the following paragraph of Judge TREAT'S opinion. Referring to the demurrer, he said: 'It was interposed, obviously, for mere delay, inasmuch as the only legal question involved had been decided, as set out in the bill, (65 Mo. 123.) adversely; which decision this court recognizes as conclusive on a question of state taxation.' 9 Fed. Rep. 810. Under the circumstances, it cannot be admitted that the decisions in question established a settled rule of property to which this court, any more than the state court, is bound to adhere. In the case of *Louisville & N. R. Co. v. Palmes*, 109 U. S. 256, 257, 13 Am. & Eng. R. Cas. 380, the supreme court of the United States refused to recognize a previous decision of the supreme court of Florida, which had incidentally upheld a corporate exemption from taxation, as establishing a rule of property such as the federal courts are bound to uphold; and what was there said, considering the circumstances under which the decision of the Florida court had been rendered, is strictly applicable to the case at bar. The court accordingly concludes that the rule to show cause why an injunction should not issue (which was heretofore entered in this suit) ought to be discharged, and an injunction refused. It is so ordered. It will be understood, of course, that the court intends to express no opinion as to the effect of the decree in the *Secor* Case, which has now become final, further than, as heretofore stated, that it cannot be regarded as working an estoppel in this proceeding. Whatever rights were secured by that decree must, of course, be enforced as between parties now entitled to the protection of the decree."

Exemption from Taxation—Effect of Consolidation.—See *Tennessee v. Whitworth* (U. S.), 29 Am. & Eng. R. Cas. 205, 211; *Tennessee v. Whitworth* (C. C.), 17 *Id.* 411; *Cheraw & S. R. Co. v. Com'rs of Anson* (N. Car.), 17 *Id.* 431, note 436; *International & G. N. R. Co. v. Anderson County* (Tex.), 13 *Id.* 660; *State Treasurer v. Auditor-General* (Mich.), 13 *Id.* 296; notes 24 *Id.* 507, 3 *Id.* 572.

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NOTE.—The mode of citing the American and English Railroad Cases is as follows :

41 Am. & Eng. R. Cas.

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Coupon tickets; company selling, containing notice that it is liable on its own line only, *held* not responsible for injury on connecting line. *Kerigan v. Southern Pac. R. Co. (Cal.)*, 28.

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Injury at station. Plaintiff *held* not precluded from recovery, by fact that she was travelling on Sunday in violation of statute. *Delaware, L. & W. R. Co. v. Trautwein (N. J.)*, 187.

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Alighting. Failure to stop at station and compelling passenger to alight from freight train a quarter of a mile distant; passenger who broke his leg, *held*

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to have no cause of action. *Adams v. Missouri Pac. R. Co. (Mo.)*, 105.

— Motion to require plaintiff to state who caused acceleration of speed alleged and by what acts, *held* properly refused. *Louisville & N. R. Co. v. Crunk (Ind.)*, 158.

— reasonable time for. Where evidence is conflicting, question is for jury. *Pennsylvania R. Co. v. Lyons (Pa.)*, 154.

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— from street car. Admission of president of company as to driver's negligence, 234 *n*.

— from moving car. Lady travelling on street car may testify to insult on former occasion, and that she left car through fear of repetition. *Ashton v. Detroit City R. Co. (Mich.)*, 235.

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- Cause of injury. Instruction that jury should consider only such injuries as were caused by derailment. Further instructions unnecessary. Texas T. R. Co. v. Johnson (Tex.), 122.
- Defective roadbed. Company is liable for injuries caused by rotten ties whereby train is derailed. Rutherford v. Shreveport & H. R. Co. (La.), 129.
- cannot be justified by pleading poverty of corporation. Texas T. R. Co. v. Johnson (Tex.), 122.
- Passenger injured owing to defective track. Evidence, 131 n.
- Derailment. Evidence of general defective condition of roadbed and previous wrecks, *held* not admissible even on issue of exemplary damages. Missouri Pac. R. Co. v. Mitchell (Tex.), 224.
- Drover in charge of cattle attempted to enter caboose from top and was injured. Verdict in his favor *held* supported by evidence. Missouri Pac. R. Co. v. Callahan (Tex.), 85.
- Duty of common carriers of passengers is duty independent of contract arising by implication. Delaware, L. & W. R. Co. v. Trautwein (N. J.), 187.
- Evidence. Declarations made by passenger who had fallen whilst alighting from train, *held* admissible. Pennsylvania R. Co. v. Lyons (Pa.), 154.
- Declarations of passenger found near where he fell about half an hour afterwards *held* not a part of *res geste*. Savannah, F. & W. R. Co. v. Holland (Ga.), 196.

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- of previous wreck elsewhere on the road, *held* not admissible. Missouri Pac. R. Co. v. Mitchell (Tex.), 224.
- Exemplary damages as applicable to common carriers; doctrine not definitely sanctioned in Louisiana. Rutherford v. Shreveport & H. R. Co. (La.), 129.
- for injuries to passengers arising from negligence, 132 n.
- Liability of company for, depends on gross negligence, indifference, or disregard for passenger's safety. Texas T. R. Co. v. Johnson (Tex.), 122.
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- Measure of damages is injuries received, sufferings and consequent loss. Rutherford v. Shreveport & H. R. Co. (La.), 129.
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- entitled to opportunity to leave train. Injury to person attempting to leave car before reasonable time has elapsed. Louisville & N. R. Co. v. Crunk (Ind.), 158.
- Pleading. Drover got on top of train and attempted to enter caboose from top and was injured. Averments in petition *held*

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proper. *Missouri Pac. R. Co. v. Callahan* (Tex.), 85.

— Allegation that plaintiff was on car and company owed him duty to safely carry him, *held*, bad in failing to show that plaintiff not a trespasser. *Breese v. Trenton Horse R. Co.* (N. J.), 230.

— Allegation that plaintiff was on car and company owed him duty to protect him while leaving it, *held* insufficient in failing to show facts giving rise to duty. *Breese v. Trenton Horse R. Co.* (N. J.), 230.

— Count charging that defendant's car by negligence of those in charge ran over plaintiff, *held* sufficient. *Breese v. Trenton Horse R. Co.* (N. J.), 230.

Position of water pipe which struck passenger while on top of car; evidence as to. *Missouri Pac. R. Co. v. Callahan* (Tex.), 85.

Starting train while drover was on top of car. Evidence that no notice was given, *held* admissible. *Missouri Pac. R. Co. v. Callahan* (Tex.), 85.

Street railway company as carrier of passengers is bound to exercise greatest care and foresight. *Watson v. St. Paul City R. Co.* (Minn.), 114.

— degree of care required of, as carriers of passengers, 116 *n.*

Use of inferior engine with fireman as engineer in running accommodation trains to fair grounds *held* negligence. *Peyton v. Texas & P. R. Co.* (La.), 550.

Wantonness or malice; testimony and special findings *held* not to establish such gross negligence as amounts to. *Atchison, T. & S. F. R. Co. v. Lindley* (Kan.), 72.

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Contributory Negligence.

Alighting at place not station where train had stopped. Injury attributed to accident or to passenger's own negligence. *Smith v. Georgia Pac. R. Co.* (Ala.), 143.

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signal failing to work, passenger jumped while train was moving at seven miles an hour and was run over by another car, *held* guilty of contributory negligence. *Weber v. Kansas City C. R. Co.* (Mo.), 117.

— from moving train by conductor's orders. Sufficiency of evidence, 171 *n.*

— from moving train. Circumstances which may render question of contributory negligence proper one for jury. *Jones v. Chicago, M. & St. P. R. Co.* (Minn.), 169.

— from moving train; failure to stop at station *held* not to justify without invitation by employe. *Walker v. Vicksburg, S. & P. R. Co.* (La.), 172.

— from moving train. Instruction authorizing recovery although plaintiff was guilty of negligence in delaying to leave train, *held* error. *Pennsylvania R. Co. v. Lyons* (Pa.), 154.

— from moving train. Instruction that contributory negligence depends on speed. Remarks in refusing instruction, *held* to constitute error. *Pennsylvania R. Co. v. Lyons* (Pa.), 154.

— from moving train. It is *prima facie* negligence for a passenger to attempt to alight from moving train. *Jones v. Chicago, M. & St. P. R. Co.* (Minn.), 169.

— from moving train not negligence *per se*. *Louisville & N. R. Co. v. Crunk* (Ind.), 158.

— from moving train not stopping long enough to allow passenger to leave. Instruction that passenger was negligent properly refused. *Pennsylvania R. Co. v. Lyons* (Pa.), 154.

— from moving train owing to. Simple unwillingness to be carried beyond destination; conduct *held* to show contributory negligence. *Walker v. Vicksburg, S. & P. R. Co.* (La.), 172.

— from moving train when placed in peril by default of company, or by direction of agent; question of negligence is for jury. *Pennsylvania R. Co. v.*

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- from slowly moving train which started before passenger had time to get off; question of negligence for jury. *Central R. & B. Co. v. Miles* (Ala.), 149.
- when station is called and train stopped, 149 *n.*
- When, station is called and train stopped, passenger may presume that train is at station, and may endeavor to alight. *Smith v. Georgia Pac. R. Co.* (Ala.), 143.
- Arm on car window; passenger travelling with, 143 *n.*
- on window sill injured by stick of cordwood piled near track. Question of contributory negligence for jury. *Moakler v. Willamette Val. R. Co.* (Ore.), 135.
- Drover travelling upon top of train, 84 *n.*
- Entering caboose from top; drover injured by being struck by water pipe. Verdict held supported by evidence. *Missouri Pac. R. Co. v. Callahan* (Tex.), 85.
- of freight train from top. Evidence of request of conductor held admissible. *Missouri Pac. R. Co. v. Callahan* (Tex.), 85.
- Freight train; passenger standing up in, 100 *n.*
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- Shipper riding in caboose, getting on top of stock car at direction of conductor and injured not entitled to recover. *Atchison, T. & S. F. R. Co. v. Lindley* (Kan.), 72.
- Postal clerk riding as passenger, not guilty of contributory negligence in riding in mail car although he would not have been injured if he had remained in smoker. (Md.), 126.
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- long enough to ascertain that train would not stop, does not violate rule. *Central R. & B. Co. v. Miles* (Ala.), 149.
- Travelling in car other than passenger car, 129 *n.*
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- PLEADING.
 - Demurrer to evidence. See EVIDENCE.
 - Complaint alleging injuries through "gross" negligence must allege that injury was inflicted wilfully or through malice. *McAdoo v. Richmond & D. R. Co.* (N. Car.), 524.
 - Defendant's corporate existence must be averred in each count. *People v. Central Pac. R. Co.* (Cal.), 653.
 - Motion to make more specific in action for personal injuries received while alighting from train held properly refused. *Louisville & N. R. Co. v. Crunk* (Ind.), 158.
- POSTAL CLERK. See PASSENGERS; *Contributory Negligence*.
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 - Argument of counsel. Discretion of court. Refusal of new trial on account of improper remarks not to be disturbed unless discretion is abused. *Weber v. Kansas City C. R. Co.* (Minn.), 114.
 - Reading of extracts from reported cases showing large damages held not excessive held error. *Ricketts v. Chesapeake & O. R. Co.* (W. Va.), 42.
 - Change of venue; admission of petition for, for purpose of establishing date of construction of road and that it is operated by a co-defendant. Harmless error. *Kankakee & S. R. Co. v. Horan* (Ill.), 13.
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Special findings *held* not so conflicting with general verdict as to require latter to be set aside. *Louisville & N. R. Co. v. Crunk* (Ind.), 158.

Verdict; sufficiency of, where two companies are sued for causing personal injuries. Verdict *held* unintelligible. *Gulf, C. & S. F. R. Co. v. Hathaway* (Tex.), 219.

Allowance of time to perfect transcript. *Smith v. Wrightsville & T. R. Co.* (Ga.), 320.

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Exemption is not corporate right or privilege within meaning of statute authorizing institution of proceedings by *quo warranto*. *International & G. N. R. Co. v. State* (Tex.), 611.

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Decision of suit for taxes of a previous year *held* not to be *res adjudicata* or to establish a rule of property. *State v. Keokuk & W. R. Co.* (Mo.), 694.

RULES AND REGULATIONS. See MASTER AND SERVANT; PASSENGERS; TICKETS AND FARES.**SIDE TRACKS.**

Absence of bunters on side track to prevent cars from running upon street *held* sufficient to show negligent construction. *Shaw v. New York & N. E. R. Co.* (Mass.), 547.

SPECIAL FINDINGS. See PRACTICE.

Motion to set aside as contrary to evidence without asking for new trial *held* improper. *Jordan v. St. Paul, M. & M. R. Co.* (Minn.), 1.

SPEED. See MASTER AND SERVANT.

Speed of trains in company's yard is governed by ordinance. *Grube v. Missouri Pac. R. Co.* (Mo.), 357.

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Alighting from train. See PASSENGERS; *Contributory Negligence*.

Absence of bunters on side track to prevent cars from running upon street *held* sufficient to show negligent construction. *Shaw v. New York & N. E. R. Co.* (Mass.), 547.

Approach to station; duty of company to light. Degree of care, 194 *n*.

Duty of company to provide safe means of access to and from stations. Right of passenger to assume that means of access are safe. *Delaware, L. & W. R. Co. v. Trautwein* (N. J.), 187.

Fright. Woman throwing herself on platform to avoid being struck by timber projecting from moving car *held* entitled to recover for impairment of health. *Buchanan v. West Jersey R. Co.* (N. J.), 59.

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—passenger arriving at station *held* justified in using since it was held out by company as one of its passageways. *Delaware, L. & W. R. Co. v. Trautwein* (N. J.), 187.

Strangers. Extinguishment of light. Trespasser, 194 *n*.

Sunday travel. Passenger injured on depot grounds not precluded from recovery by fact that she was travelling on Sunday. *Delaware, L. & W. R. Co. v. Trautwein* (N. J.), 187.

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Unguarded hole in platform at elevated railway station; passenger in getting on train stepped into; *held* that there was case for jury. *Boyge v. Manhattan R. Co. (N. Y.)*, 111.

Unlighted stairway; passenger using when there were lighted stairways held to assume risk of accident. *Bennett v. New York, N. H. & H. R. Co. (Conn.)*, 184.

STOCK AND STOCKHOLDERS.

Connecting lines. Company owning stock in connecting line is liable only as a stockholder, and is not liable for negligence of connecting road. *Atchison, T. & S. F. R. Co. v. Cochran (Kan.)*, 48.

Negligence. Railway stockholder not liable for negligence of officers or employes in operation of road. *Atchison, T. & S. F. R. Co. v. Cochran (Kan.)*, 48.

Purchase of stock of connecting road by connecting company *held* lawful. *Atchison, T. & S. F. R. Co. v. Cochran (Kan.)*, 48.

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Boy walking on track. Contributory negligence. Province of jury, 508 *n.*

Carrier of passengers; degree of care required of company as, 116 *n.*

— street railway company as, is bound to exercise greatest care and foresight. *Watson v. St. Paul City R. Co. (Minn.)*, 114.

Child travelling on car with driver's knowledge *held* entitled to diligence due to passengers of his age and discretion, whether he intended to pay fare or not. *Metropolitan St. R. Co. v. Moore (Ga.)*, 240.

Leaving platform of street car with children upon it *held* to be negligence on part of driver. *Metropolitan St. R. Co. v. Moore (Ga.)*, 240.

Company must use proper care to prevent collision with others using railroad track. *Chicago W. D. R. Co. v. Ingraham (Ill.)*, 243.

Injuries to passenger alighting from moving car. Evidence of excessive speed and that bell on approaching car was not rung

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held to establish negligence. *Weber v. Kansas City C. R. Co. (Mo.)*, 117.

Ringling bell of cable car near crossing is not negligence though horse frightened thereby. *Steiner v. Philadelphia Traction Co. (Pa.)*, 535.

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SUNDAY. See **PASSENGERS**.**SURFACE WATERS.** See **DRAINS AND DITCHES**.

Waters from rainfall gathered from hills after they have become part of stream are governed by rules applicable to watercourses. *Mississippi & T. R. Co. v. Archibald (Miss.)*, 4.

Construction of road. Instruction held not erroneous as authorizing jury to consider sources of overflow not alleged in petition. *Sabine & E. T. R. Co. v. Broussard (Tex.)*, 26.

Duty of company. In action for overflow jury should consider if damage would have occurred if roadbed had been properly constructed. Instruction *held* proper. *Sabine & E. T. R. Co. v. Broussard (Tex.)*, 26.

Obstruction of surface waters, 4 *n.*
— by construction of railroad across prairie. Rule that landowner may use such land as it is ordinarily used, applied. *Jordan v. St. Paul, M. & M. R. Co. (Minn.)*, 1.

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TAXATION.**Generally.**

Tax received by state treasurer cannot be apportioned to counties in absence of appropriation by law. *State v. Harshaw (Wis.)*, 685.

Payment after expiration of statute providing for percentage upon earnings in lieu of taxation, is not apportionable to counties. *State v. Harshaw (Wis.)*, 685.

Statute requiring payment of percentage of gross earnings in lieu

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of license fee *held* valid under reserved power to amend charter. City of New York v. Twenty-Third St. R. Co. (N. Y.), 640.

Lessee of railroad is liable for percentage of gross earnings although no provision contained in lease. City of New York v. Twenty-Third St. R. Co. (N. Y.), 640.

Percentage in lieu of taxation *held* to be license fee for the year and not tax upon gross earnings for year preceding levy. State v. Harshaw (Wis.), 685.

Credit for over-payment of previous year's taxes constitutes voluntary payment under mistake of law. Louisville & N. R. Co. v. Com. (Ky.), 595.

Interest is not payable on over-due taxes. Louisville & N. R. Co. v. Com. (Ky.), 595.

Property Taxable.

Branch to stone quarry used for obtaining ballast *held* assessable as railroad track under statute. Chicago & A. R. Co. v. People (Ill.), 629.

Gross receipts of Union Depot Co. *held* not to be taxable when tax paid upon gross receipts of companies owning it. State v. St. Paul Union Depot Co. (Minn.), 636.

Liability of grantees of "railroad land-grant lands" reserved for payment of claims, 684 *n*.

Percentage of gross receipts is computed in proportion to length of road within city when line extends beyond city limits. Baltimore Union Pass. R. Co. v. Baltimore (Md.), 646.

Estimates by passengers of number travelling on cars within city are not admissible in action for percentage upon gross earnings. Baltimore Union Pass. R. Co. v. Baltimore (Md.), 646.

Deductions from earnings of another company by way of compromise of dispute *held* not to be allowable in reduction of claim against defendant. Baltimore Union Pass. R. Co. v. Baltimore (Md.), 646.

Rolling stock, 578 *n*.

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for interstate traffic is not taxable by state. Bain v. Richmond & D. R. Co. (N. Car.), 574. Sleeping cars, 578 *n*.

Statute granting lands *in presenti*, patents to issue upon completion of sections of road, confers indefeasible right and lands are taxable by the state. Wisconsin Cent. R. Co. v. Price County (U. S.), 669.

Approval of selection of idemnity lands *held* essential to title of company and lands not taxable until selected and approved. Wisconsin Cent. R. Co. v. Price County (U. S.), 669.

Omission of property from schedule estops company to claim that it is assessable as railroad track and not as real estate. Indianapolis & St. L. R. Co. v. People (Ill.), 634.

Assessment and Levy.

Assessment of railroad property by special board of commissioners does not violate constitutional provision requiring assessment to be equal and uniform throughout state. St. Louis, I. M. & S. R. Co. v. Worthen (Ark.), 589.

Constitutionality of statutes creating special boards, 595 *n*.

Annual assessments of railroads and biennial assessments of other property do not cause inequality. St. Louis, I. M. & S. R. Co. v. Worthen (Ark.), 589.

Notice of time and place of meeting of board of assessors need not be given when fixed by statute. St. Louis, I. M. & S. R. Co. v. Worthen (Ark.), 589.

Statute not unconstitutional for failure to provide for appeal. St. Louis, I. M. & S. R. Co. v. Worthen (Ark.), 589.

Order levying tax for specific purpose must specify purpose. Louisville & N. R. Co. v. Com. (Ky.), 595.

Adjournments from day to day of regular term of court do not affect power of court to levy taxes at such adjourned term. State v. Hannibal & St. J. R. Co. (Mo.), 581.

Levy of taxes raises presumption

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of regularity and validity. *State v. Hannibal & St. J. R. Co.* (Mo.), 581.

Recital of order for levy of omitted taxes *held* sufficient to raise presumption that taxes had been omitted. *State v. Hannibal & St. J. R. Co.* (Mo.), 581.

Statute waiving informalities in assessment does not waive informalities in levy. *People v. Central Pac. R. Co.* (Cal.), 653.

Collection, Actions, etc.

Constitutional provision relative to the assessment of railroads does not confer power to enact special laws for collection of tax. *People v. Central Pac. R. Co.* (Cal.), 653.

Special scheme for collection of tax upon railroads in more than one county in Cal. Pol. Code, is special legislation and invalid. *People v. Central Pac. R. Co.* (Cal.), 653.

Form of complaint is governed by Cal. Code Civ. Proc. and not by special provision of Pol. Code. *People v. Central Pac. R. Co.* (Cal.), 653.

Form of special complaint in Cal. Pol. Code for recovery of tax is special legislation and invalid. *People v. Central Pac. R. Co.* (Cal.), 653.

Complaint in one count for taxes payable to state and taxes apportioned to counties, is bad for misjoinder of causes. *People v. Central Pac. R. Co.* (Cal.), 653.

Authority to make assessment must be set out in complaint. *People v. Central Pac. R. Co.* (Cal.), 653.

Defendant's corporate existence must be averred in each count. *People v. Central Pac. R. Co.* (Cal.), 653.

Petition to enforce payment *held* to contain sufficient description when it set out number of miles of road in county and assessed value of road and rolling stock. *State v. Hannibal & St. J. R. Co.* (Mo.), 581.

Indebtedness for taxes is insufficiency averred when no allegation is made that taxes were levied upon defendant or its

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property. *People v. Central Pac. R. Co.* (Cal.), 653.

Ownership of property in defendant must be averred. *People v. Central Pac. R. Co.* (Cal.), 653.

Number of miles of road in township need not be specified in petition. *State v. Hannibal & St. J. R. Co.* (Mo.), 581.

Adoption of township organization by county need not be alleged in petition. *State v. Hannibal & St. J. R. Co.* (Mo.), 581.

Waiver under statute of informalities in assessment does not dispense with necessity of showing that valid tax has been levied. *People v. Central Pac. R. Co.* (Cal.), 653.

Decision of suit for taxes of a previous year held not to be *res adjudicata* or to establish a rule of property. *State v. Keokuk & W. R. Co.* (Mo.), 694.

Exemption.

Exemption is not corporate right or privilege within meaning of statute authorizing institution of proceedings by *quo warranto*. *International & G. N. R. Co. v. State* (Tex.), 611.

Failure to exercise corporate privileges is not sufficient ground for declaring exemption of company's lands forfeited. *International & G. N. R. Co. v. State* (Tex.), 611.

Acceptance of land grant under charter abrogating exemption from state taxes *held* not to affect exemption from county taxes. *State v. Hannibal & St. J. R. Co.* (Mo.), 581.

Exemption from county tax does not exempt from municipal tax, *e. g.*, tax for payment of township aid bonds. *State v. Hannibal & St. J. R. Co.* (Mo.), 581.

Exemption *held* to extend for 10 years from date of statute and not from date of patents. *State v. Harshaw* (Wis.) 685.

Charter exempting property from taxation for 20 years after completion of railroad to Mississippi *held* not to take effect until completion of railroad. *Yazoo & M. V. R. Co. v. Thomas* (U.

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- S.), 599.
- Trust deed conveying land grant held to amount to sale or conveyance of land, and exemption to have terminated. *In re St. Paul, S. & T. F. R. Co.*, (Minn.), 619.
- Effect of sale or conveyance of land grant; 625 *n*.
- Hotel at summer resort is not within exemption of railroad property. *State v. St. Paul, M. & M. R. Co.* (Minn.), 625.
- Statute imposing tax upon railroad raises question whether charter exemption affected, and whether obligation of contract impaired and gives jurisdiction to the federal court. *Yazoo & M. V. R. Co. v. Thomas* (U. S.), 599.
- Consolidation under Missouri statute abrogates exemption from taxation contained in charter of old company. *State v. Keokuk & W. R. Co.* (Mo.), 694.
- Effect of consolidation, 702 *n*, 706 *n*.
- Division of company into two corporations does not affect immunity from taxation to pay subscription to stock of old company. *Louisville & N. R. Co. v. Com.* (Ky.), 595.
- Tax for payment of subscription to stock specially levied under provisions of charter is county tax within meaning of exemption. *State v. Hannibal & St. J. R. Co.* (Mo.), 581.
- TICKETS AND FARES.**
- Cash fare. Additional charge of 10 cents, held not "a charge for transportation" within meaning of statute limiting rate. *Reese v. Pennsylvania R. Co.* (Pa.), 31.
- regulation charging passengers paying, additional 10 cents which they may have refunded, held not unreasonable. *Reese v. Pennsylvania R. Co.* (Pa.), 31.
- Regulation requiring additional charge of 10 cents, not invalid on account of certain exceptions. *Reese v. Pennsylvania R. Co.* (Pa.), 31.
- Regulations, requiring purchase of tickets for passenger

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- trains, 34 *n*.
- Custom to refund amount paid by holders of commutation tickets, 34 *n*.
- Commutation tickets. Refunding of purchase price, 35 *n*.
- Connecting lines. Coupon tickets. See PASSENGERS.
- Purchase of ticket. Duty of company to sell. Incorrect information supplied by officials, 35 *n*.
- TORTS.**
- Joint tort-feasors. See NUISANCE.
- TRESPASSERS. See PASSENGERS, *Who are Passengers.*
- TRESPASSERS.**
- Injuries Generally.**
- Duty to stop, look and listen applies to foot travellers. *Pennsylvania R. Co. v. Aiken* (Pa.), 571.
- Lookout only required when special reason exists therefor. *Carrington v. Louisville & N. R. Co.* (Ala.), 543.
- Duty to maintain lookout and discover trespassers, 547 *n*.
- Collection of houses fenced off from track does not necessitate lookout. *Carrington v. Louisville & N. R. Co.* (Ala.), 543.
- Signals need not be given under the common law when approaching collection of houses. *Carrington v. Louisville & N. R. Co.* (Ala.), 543.
- Gross negligence. Misleading instructions, 547 *n*.
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- Use of inferior engine with fireman as engineer in running accommodation trains to fair grounds held negligence. *Peyton v. Texas & P. R. Co.* (La.), 550.
- Evidence held sufficient to show that train hands must have seen deceased in time to avoid injuring him. *Rine v. Chicago & A. R. Co.* (Mo.), 555.
- Evidence as to number of persons on track at time of injury held to be admissible under circumstances. *Whalen v. Chicago & N. W. R. Co.* (Wis.), 558.
- as to intoxication of injured

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Licensees.

Injuries to licensees using track, 503 *n.*

Injury by substance thrown from train. Sufficiency of evidence, 503 *n.*

Running section of train without signals or lookout at place where people are accustomed to cross track is negligence. *Conley v. Cincinnati, N. O. & T. P. R. Co. (Ky.)*, 537.

Custom of inhabitants of town to cross track imposes on trainhands duty to keep lookout. *Conley v. Cincinnati, N. O. & T. P. R. Co. (Ky.)*, 537.

Lookout must be kept at place where adults and children in considerable numbers are likely to be passing upon track. *Whalen v. Chicago & N. W. R. Co. (Wis.)*, 558.

License to use bridge as footway inferred from habitual and constant use without objection by company. *Hooker v. Chicago, M. & St. P. R. Co. (Wis.)*, 498.

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Acquiescence in use of track for pedestrian purposes is not sufficient to prove license. *Carrington v. Louisville & N. R. Co. (Ala.)*, 546.

Custom to cross tracks by foot path 100 yards from place of accident not admissible to prove license. *Carrington v. Louisville & N. R. Co. (Ala.)*, 546.

License upon track is guilty of contributory negligence if he fails to keep lookout. *McAdoo v. Richmond & D. R. Co. (N. Car.)*, 524.

Children.

Boy 10 years of age upon railroad track without right held to be a trespasser and that no recovery could be had although he could not be guilty of contributory negligence. *Pennsylvania R. Co. v. McMullen (Pa.)*, 505.

TRESPASSERS.**Children—Continued.**

Injuries to boy on freight car. Evidence. Signals. Existence of fence. Custom of people to cross switch, 504 *n.*

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Boy 9 years of age. Contributory negligence, 507 *n.*

Admissibility of evidence as to plaintiff's having boarded cars to get a ride. *Whalen v. Chicago & N. W. R. Co. (Wis.)*, 558.

Contributory Negligence.

Crossing track in front of approaching train held to bar action. *Pennsylvania R. Co. v. Aiken (Pa.)*, 571.

Failure of trespasser to keep lookout for approaching train held to bar recovery even of partial damages under Georgia statute. *Smith v. Central R. & B. Co. (Ga.)*, 490.

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Auxiliary company built in interest of older road; liability of parent company for act of, in obstructing watercourse. *Kankakee & S. R. Co. v. Horan (Ill.)*, 13..

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— purchaser of lands *held* to have right of action for, although stream was obstructed before he became owner. *Mississippi & T. R. Co. v. Archibald* (Miss.), 4.

— Right of action of owner of reversionary estate; complaint alleging obstruction, *held* to show. *Kankakee & S. R. Co. v. Horan* (Ill.), 13.

— Tenancy at will. Owner of reversion *held* entitled to damages measured by depreciation of market value by reason of overflow. *Kankakee & S. R. Co. v. Horan* (Ill.), 13.

Overflow. See BRIDGE.

— Damages. Competency of opinion evidence as to market value of land before and after and that depreciation was caused by overflow resulting from obstruction. *Kankakee & S. R. Co. v. Horan* (Ill.), 13.

— Construction of road. In-

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struction *held* not erroneous as authorizing jury to consider sources of overflow not alleged in petition. *Sabine & E. T. R. Co. v. Broussard* (Tex.), 26.

— Evidence. Admissibility of bill for injunction in subsequent action for damages as admissions of plaintiff. *Kankakee & S. R. Co. v. Horan* (Ill.), 13.

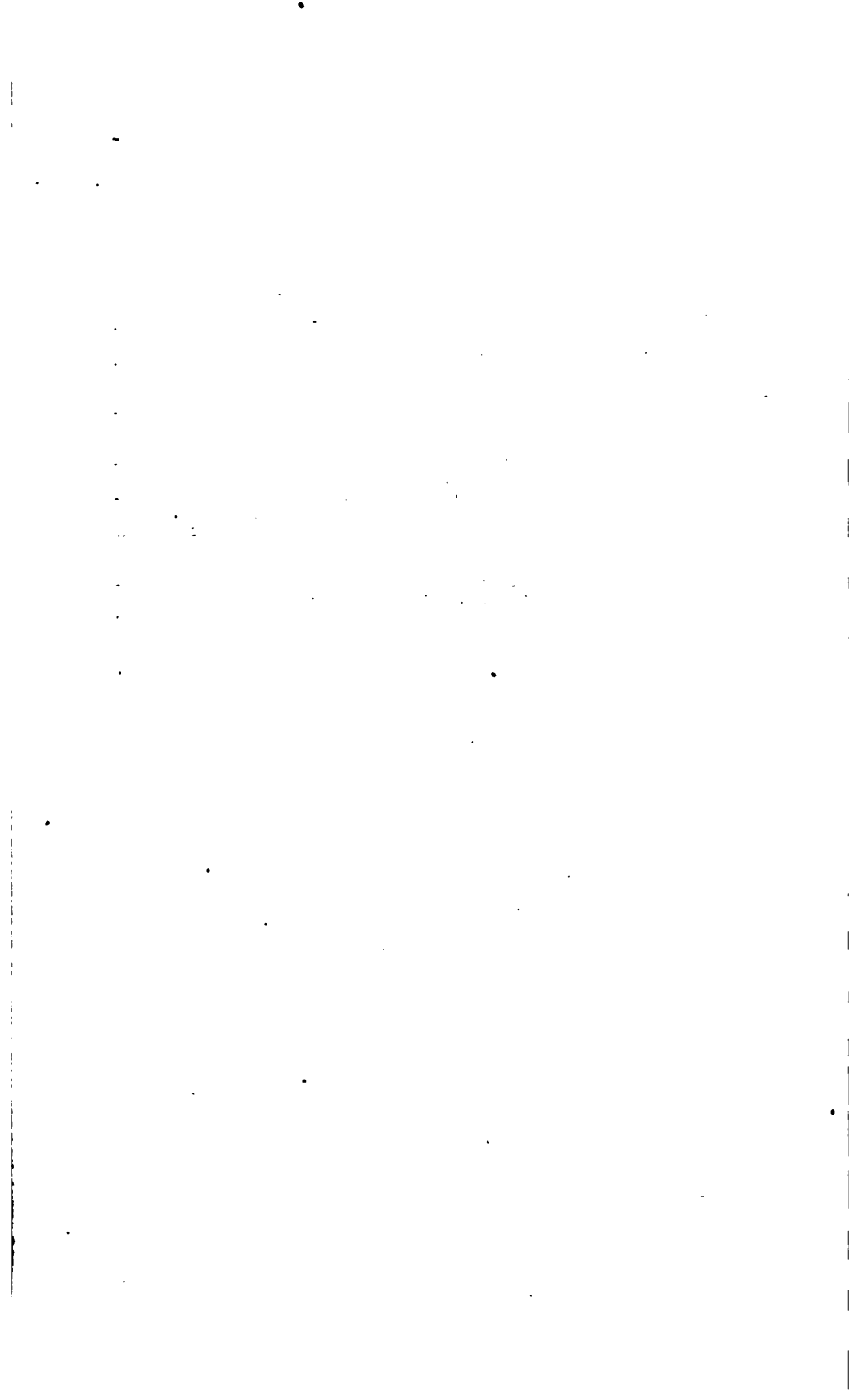
— Evidence. Maps of land overflowed, *held* admissible. *Kankakee & S. R. Co. v. Horan* (Ill.), 13.

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— of streams, *q n*.

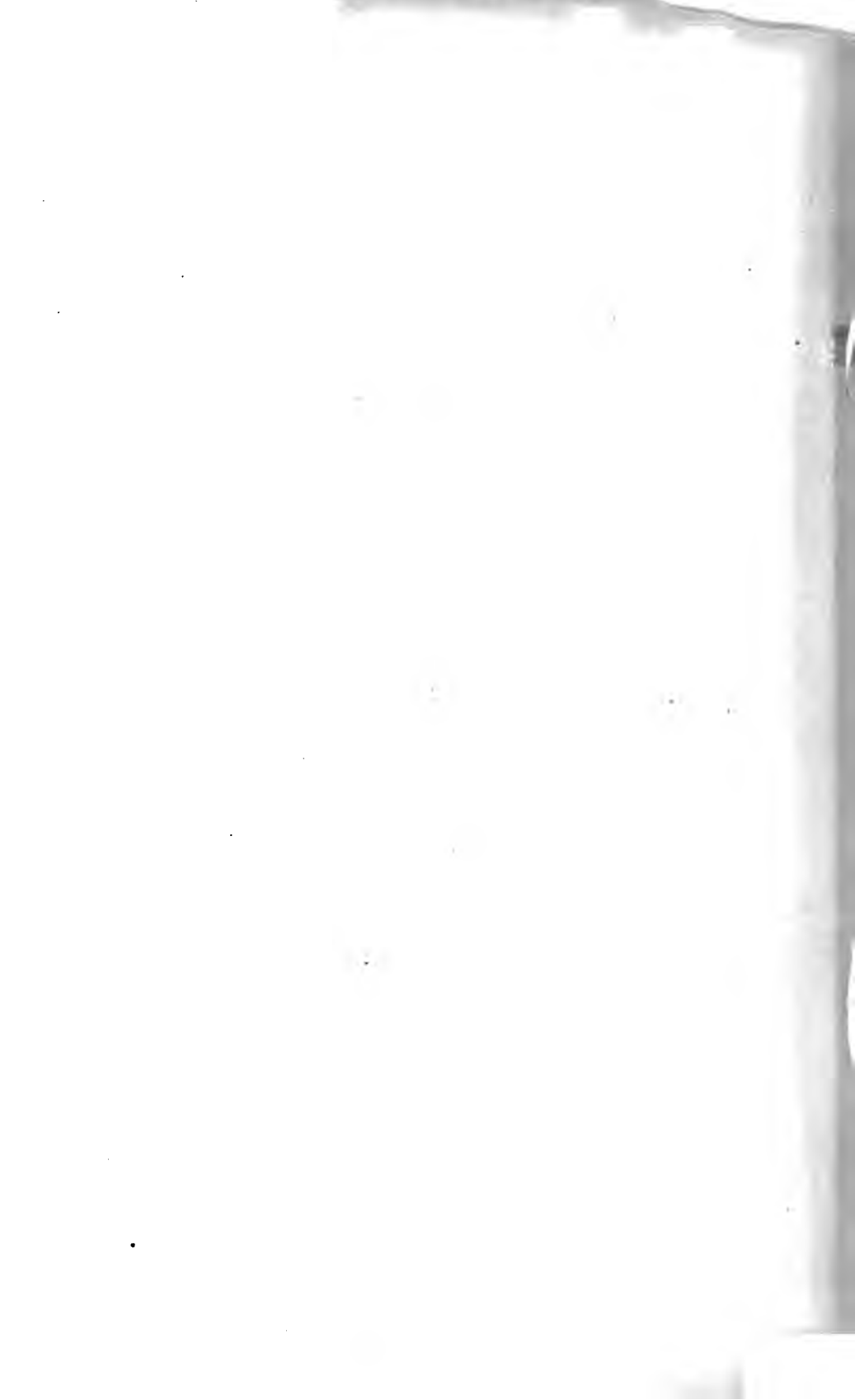
Surface waters. Waters from rainfall gathered from hills after they have become part of stream are governed by rules applicable to watercourses. *Mississippi & T. R. Co. v. Archibald* (Miss.), 4.

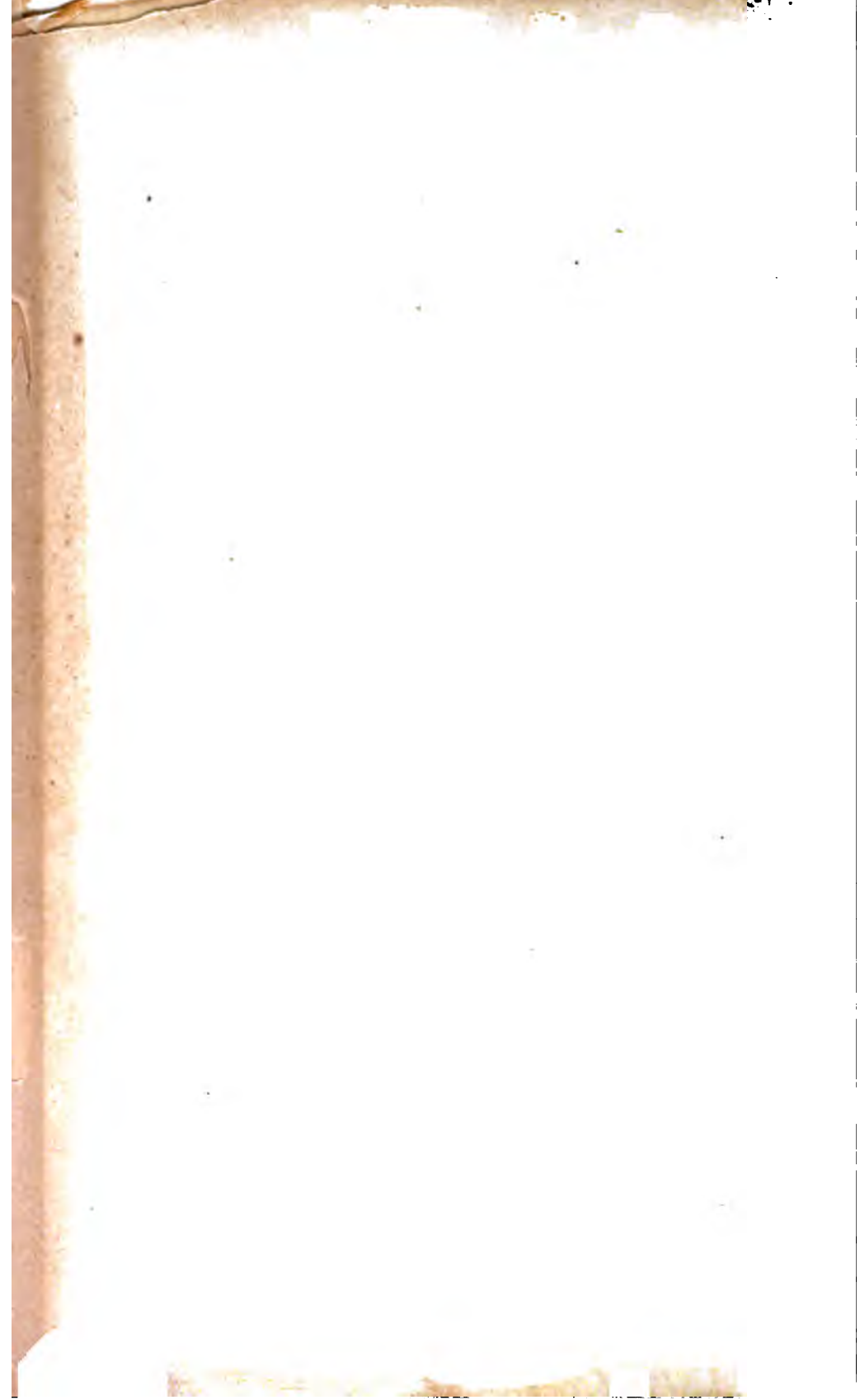
WITNESS. See EVIDENCE.













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